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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD J. SINNOTT,
PETITIONER,

v.

CHARLES A. RADIN, STATE-BOSTON RETIREMENT BOARD, THOMAS W. GATELY, LOUISE DAY HICKS, NEWELL COOK, BRIAN LEAHY, HAROLD J. CARROLL AND KEVIN H. WHITE
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether Branzburg v. Hayes, 408 U.S. 665 (1972) should be re-examined in the context of a judgment of contempt in a civil action against a non-party "investigative" reporter who obtained information which was under governmental control and not available to the public generally from confidential sources.

2. Whether requiring a non-party "investigative" reporter to appear and and answer questions at a deposition in a civil action abridges the freedom of speech and press guaranteed by the First Amendment.

3. Whether refusing to compel a non-party reporter to answer questions relating to persons previously deposed which may impeach or contradict the

testimony of such persons abridges a litigant's interest in obtaining evidence necessary to prove his claim and the public interest in the fair administration of justice guaranteed under the Fourteenth Amendment.

PARTIES TO THE PETITION

The petitioner is Richard J. Sinnott, the plaintiff in a civil action now pending before the trial court of the Commonwealth of Massachusetts entitled "Richard J. Sinnott v. State-Boston Retirement Board et al.", Suffolk Superior Court docket number 54952 ("the Superior Court action"), and the appellee in the appeal of Charles A. Radin from a judgment of contempt decided on June 13, 1988 by the Supreme Judicial Court of the Commonwealth of Massachusetts, docket

number S-4754 ("the appeal").

The respondents are Charles A. Radin ("Radin"), a non-party witness in the Superior Court action, and the appellant in the appeal, and the State-Boston Retirement Board, Thomas W. Gately, Louise Day Hicks, Brian Leahy, Harold Carroll, and Kevin H. White, all of whom are defendants in the Superior Court action and designated as appellants in the appeal.

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The petitioner, Richard J. Sinnott, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts described below.

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts reversing the judgment of contempt entered against the respondent Charles A. Radin was decided on June 13, 1988 and has been reported at 402 Mass. 581 (1988). A copy of the opinion appears in the Appendix to this petition.

JURISDICTION

The order of the Supreme Judicial

Court of the Commonwealth of Massachusetts, a state court of last resort, was entered on June 13, 1988. This petition for certiorari is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Rule 17 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the First and Fourteenth Amendments to the Constitution of the United States and Massachusetts General Laws c. 4, §7, clause twenty-sixth, c. 66, §10 and c. 214, §1B. Being lengthy, these provisions are set forth in the Appendix filed herewith.

STATEMENT OF THE CASE

Pre-Appeal

The petitioner, Richard J. Sinnott ("Sinnott"), filed the Superior Court action on May 14, 1982. The action arose from the disclosure of information contained in Sinnott's application for a disability pension which he had filed with the State-Boston Retirement Board ("the Retirement Board"). The information was disclosed to the respondent Radin, a reporter for The Boston Globe.

The defendants in the Superior Court action are the State-Boston Retirement Board ("the Retirement Board"), Thomas W. Gately ("Gately"), Louise Day Hicks ("Hicks"), Newell Cook ("Cook")

(individually and as they were members of the Retirement Board), Brian Leahy ("Leahy") (individually and as he was Executive Officer of the Retirement Board), Harold Carroll ("Carroll") (individually and as he was Corporation Counsel for the City of Boston), and Kevin H. White ("White") (individually and as he was Mayor of the City of Boston).

In Count I of the complaint in the Superior Court action, Sinnott alleges invasion of privacy in violation of G.L. c. 214, §1B; in Count II, Sinnott alleges a violation of G.L. c. 214, §3B (which establishes a cause of action for disclosure of personal data by a holder thereof); and in Count III, Sinnott alleges a violation of 42 U.S.C. §1983,

asserting that the disclosure of information concerning his application for a disability pension was a reprisal for articles written by Sinnott concerning the respondent White and his administration in violation of his rights under the First and Fourteenth Amendment to the Constitution of the United States.

Following entry of the action and service of the defendants, the parties commenced the discovery phase of the litigation through interrogatories, document requests and depositions.

On August 27, 1985, Sinnott first subpoenaed Radin to attend a deposition and to produce documents relating to an article written by Radin which appeared in The Boston Globe on April 5, 1982 and which included selected excerpts from

Sinnott's application and accident statement filed with the Retirement Board. On October 1, 1985, Radin filed a Motion to Quash the subpoena. In the motion Radin first asserted the issues relating to Sinnott's status as a public official, to the viability of the cause of action and to the First Amendment interests in the free flow of information.

After service of the subpoena on Radin on September 23, 1985, the defendants filed Motions for Summary Judgment raising the same or similar issues to those raised by Radin in his Motion to Quash, particularly issues with respect to whether the complaint stated a cause of action upon which relief could be granted. After hearing, on June 11,

1986, the defendants' Motions were denied. On July 11, 1986, in the Memorandum of Decision and Order on Defendants' Joint Motion for Summary Judgment (Sullivan, J.P.J.), the court stated that it was not prepared to rule as a matter of law that the facts disclosed did not rise to the degree of intimate, personal facts which would support a cause of action. The court further stated:

> Additionally, the fact that plaintiff maintained a position in the public eye should not deprive him of the same confidential treatment that all public employees applying for a pension should receive and which appeared to be the Board's policy. It would appear that the information disclosed to the press constitutes medical or medically-related information sufficient to create a genuine, triable issue.

Radin's Motion to Quash was heard and, on July 16, 1986, denied "without prejudice to seek protective relief if appropriate when the deposition is in progress".

Radin was deposed on July 31, 1986. Radin refused to answer a number of questions during his deposition, including questions relating to persons previously deposed.

On July 31, 1986, Sinnott filed a Motion to Compel Radin's testimony. Sinnott asserted inter alia that, in applying a balancing test, at the very minimum Radin should be compelled to answer questions concerning persons previously deposed who had denied or

effectively denied[1] either being a source of the information or knowing who was. Sinnott further asserted that compelling Radin to so testify would provide impeachment evidence and avoid allowing discovery to become a "game of hare and hounds".

Radin filed a renewed Motion to Quash or for a Protective Order asserting inter alia that the complaint failed to state a claim upon which relief could be granted, that the interests in protecting Radin's pledge of confidentiality outweighed Sinnott's interest in

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[1] For the purposes of this petition, the two deponents who invoked their Fifth Amendment privilege are considered as having effectively denied being Radin's sources in light of representations made by their counsel to the trial court.

discovery, and that Sinnott had not exhausted alternative sources.[2]. The motions were heard simultaneously on August 6, 1986. On August 8, 1986, the court (Morse, J.) allowed Radin's renewed motion and prohibited the taking of a further deposition of Radin except on order of the court "and an adequate showing that the plaintiff is not able to obtain this discovery by other means ...."

On August 8, 1986, Sinnott filed a Motion for Reconsideration. While that motion was pending, the plaintiff resumed discovery.

On December 5, 1986, the court

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[2] See Memorandum and Order dated December 6, 1986 which is reproduced in the Apendix.

(Morse, C.J.) issued Findings of Fact, Rulings of Law and Order on Plaintiff's Motion to Compel Discovery (a copy of which is included in the Appendix) denying the same. In doing so, the court engaged in a balancing of the public interest in every person's evidence and the public interest in protecting the free flow of information, concluding that the Motion to Compel should be denied.

Following the order of December 5, 1986, Sinnott continued discovery, taking additional depositions and moving (unsuccessfully) to compel testimony of two deponents who had invoked their Fifth Amendment privilege and refused to testify.

All of those deposed who testified denied having disclosed the information

to Radin and denied knowing who did. Most of the defendants claimed they first learned of the application when they read the Radin article. Another defendant, by contrast, had claimed that there were rumors about the application all over City Hall. Many witnesses claimed a failure of memory when asked if they knew who had disclosed the information to Radin.

On September 29, 1987 after having conducted depositions of twenty-seven persons[3], Sinnott filed his Motion to Vacate Orders of August 8, 1986 and December 5, 1986 and to Compel the

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[3] Sinnott had at this time deposed all persons identified in answers to interrogatories by the Retirement Board as having access to the Sinnott application. See Supreme Judicial Court opinion, n. 2.

Deponent Charles A. Radin to Answer Certain Questions.[4] Radin objected to the allowance of the motion, asserting grounds similar to those advanced in the prior Motion for a Protective Order which had been allowed on August 8, 1986. That motion was denied by the trial court (Morse, C.J.) on November 23, 1987.

On November 27, 1987, Sinnott filed an interlocutory petition in the Appeals Court, the intermediate appellate court for the Commonwealth, seeking relief from

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[4] In support of the Motion, Sinnott filed certain exhibits: Exhibit 1, Questions proposed to be Answered by Radin; Exhibit 2, Transcript of Deposition of Radin; Exhibit 4, Depositions Taken by the petitioner; Exhibit 5, Excerpts of Deposition Testimony, as well as a 30 page Offer of Proof detailing the discovery done and the information obtained as a result of that discovery.

the order of November 23, 1987, Docket No. 87-0673-CV ("the Appeals Court petition"). After hearing, the Appeals Court petition was allowed by the Single Justice (Perretta, J.) who stated that she could not "discern any public interest to be served by protecting the 'free flow' of information to which the public has, at best, limited and restricted access." The Superior Court order dated November 23, 1987 was reversed and the matter was remanded to the Superior Court for the entry of a new order requiring Radin to "answer those twenty-eight questions set out in Exhibit 1 to the plaintiff's motion of September 29, 1987."[5] A copy of the Memorandum of

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[5] The first twenty-seven questions related to individuals who had been deposed, asking Radin in each

the Appeals Court Justice is set forth in the Appendix.

Sinnott moved to implement the order of the Single Justice. The motion was allowed by the court (Sullivan, J.P.J.) over Radin's objection on February 10, 1988.

Radin was deposed on February 18, 1988 pursuant to the February 10, 1988 order and he refused to answer each and every question set forth on Exhibit 1 attached to the order of February 10, 1988.

On February 18, 1988, Sinnott moved for sanctions against Radin for his

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instance whether the individual had been a source of the information concerning Sinnott. The twenty-eigth question asked for the identity of Radin's sources if all of the answers to the preceding questions were negative.

refusal to comply with the order. On February 18, 1988, the court (Sullivan, J.P.J.) adjudicated Radin in civil contempt and ordered him incarcerated until such time as he should comply with the order of February 10, 1988.[6]

Appeal

Radin appealed from the judgment of civil contempt entered against him on February 18, 1988. The appeal was entered in the Appeals Court for the Commonwealth. Thereafter, the Supreme Judicial Court acting sua sponte transferred the appeal to that court for direct appellate review.

In the appeal, issues relating to the balancing of the public interest to

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[6] That order was stayed pending an expedited appeal.

every person's evidence and the asserted interest in the free flow of information, incorporating arguments previously made in the trial court and before the Single Justice of the Appeals Court, were argued by both parties, as well as by amicus curiae.

The appeal was argued on April 7, 1988 and decided on June 13, 1988. The Supreme Judicial Court found that it was not improper for the trial court to consider the potential damage to the free flow of information which might result from compelled disclosure and the investigative purpose of and the public interest in Radin's use of confidential sources. The order holding Radin in contempt was reversed.

Factual Background

The Retirement Board administers the retirement system for employees of the City of Boston. Applications for job related disability pensions are filed with the Retirement Board and processed by the disability section. The Retirement Board requires that an accident statement be filed with an application for a disability pension.

Access to disability files was limited. It was the policy and practice of the Retirement Board not to release any information concerning either pending or completed applications for disability pensions to anyone except to employees who had responsibility for processing the application. Prior to the incident here in issue, no applications, pending or

press without the consent of the applicant. Any disclosure of the contents of a pending disability application required a vote of Board members.

In 1982, Sinnott had been employed by the City of Boston for approximately twenty-two (22) years. In the later years, he served as the Chief of the Licensing Division of the Office of the Mayor. On February 17, 1982, Sinnott received notice of his termination effective two weeks later.

A reorganization of the Licensing Division had caused dissention between then Mayor Kevin H. White and Sinnott. According to Radin, Sinnott who had been out sick for long periods during the year preceding his termination "was involved

in a bitter City Hall turf fight with White's licensing commissioner, Joanne Prevost ... ."

In addition to his position in the City, Sinnott was a columnist writing for a number of local newspapers. Sinnott was described by Radin as being "widely known as a fiery conservative columnist" who "often has used his columns to attack Mayor Kevin H. White's administration ... ." According to George K. Regan, Jr. ("Regan") then press secretary to White, Sinnott wrote articles "detrimental to the City of Boston."

On February 26, 1982, Sinnott filed his disability pension application and accident statement with the Retirement Board. In the application, Sinnott sought a stress related disability. In

the accident statement, Sinnott described not only events which had occurred while he was Chief of Licensing but also the effect that those incidents had on him emotionally.[7] The Sinnott application was filed with and processed by the disability section of the Retirement Board.

On March 28, 1982, The Boston Globe published an article by Radin and Stephen Kurkjian entitled "Ex-ward boss' city pension" which related to a disability pension awarded to Robert Toomey ("the Toomey article"). In that article, it

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[7] In its opinion, the Supreme Judicial Court incorrectly states that the application related to the emotional impact of Sinnott's attendance at concerts "in his capacity as 'city censor'", a position Sinnott had previously held in the City.

was reported that Toomey gave "reporters access to his otherwise confidential file with the retirement board." The article also detailed Toomey's political associations with Mayor White and Theodore Anzalone, then an attorney for the Retirement Board.

On April 5, 1982, Radin's article entitled "Hub city clerk, ex-censor file for disabilities". In the article, Radin quoted at length from the accident statement filed by Sinnott. Unlike the Toomey article, the information concerning the Sinnott application and accident statement was attributed to unidentified "sources" and "city hall sources".

According to Radin, those sources, i.e. persons having first-hand knowledge,

provided the information to him on the express condition that Radin not reveal their names.

Sinnott was first contacted the night before publication of the article and is reported to have stated, "I have an attorney handling this. I thought all of this was supposed to be confidential."

There was no vote of the Retirement Board members authorizing disclosure of the Sinnott application to Radin. All members and officials of the Retirement Board who had been deposed denied disclosing or authorizing the disclosure of the contents of the Sinnott application to Radin.

By letter dated April 23, 1982, Sinnott, noting that his application had been given to a member of the media,

withdrew his disability pension application stating that he did so "because of the misuse that was made of the application."

Following the Sinnott article there, were a number of further articles published by The Boston Globe on the Retirement Board and disability pension system, including articles about reform proposals advanced by the defendant White which would "open applications for disability pensions to greater public examination." With the exception of the Sinnott article which related to two pending applications, the articles published related to persons receiving disability pensions.

REASONS FOR GRANTING WRIT

I. **In ruling that the trial court was warranted in considering the potential damage to the free flow of information, the Supreme Judicial Court has departed from the decisions of this Court which have uniformly held that the First Amendment does not guarantee the press a greater right of access to governmental information than that afforded to the public generally.**

This Court has not ruled that the First Amendment guarantees the press a right of special access to information within the control of the government greater than that afforded the public generally. Branzburg v. Hayes, 408 U.S. 665, 684 (1972); Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978). In Pell v. Procunier, 417 U.S. 817, 834 (1974) and in Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974), the decision holding

that the press and media had no constitutionally protected special right of access to prisons was based upon the assumption that the First Amendment does not guarantee the press special access to governmental information. See Houchins v. KQED, Inc., 438 U.S. at 10.

Although the Court has stated that "news gathering is not without its First Amendment protections," Branzburg v. Hayes, 408 U.S. at 707, that dicta "in no sense implied a right of access to news sources." Houchins v. KQED, Inc., 438 U.S. at 10. That observation was made in Branzburg in response to a claim advanced that compelling a reporter to disclose confidential information to a grand jury would violate the First Amendment by deterring confidential sources from

disclosing information. Id. at 10-11.

The decision of the Supreme Judicial Court which is the subject of this petition was made in the context of a judgment finding a so-called "investigative" reporter in contempt for refusing to answer questions during a deposition after an order issued directing him to do so. The answers to those questions would result in the reporter's disclosing the identity of sources of information concerning the petitioner which had been disclosed to the reporter, Radin.

As in Branzburg, the reporter asserted protection under the First Amendment and the potential damage to public's interest in the free flow of information and the deterrent effect of

compelled disclosure on the news-gathering process. However, the information which had been disclosed to the reporter had been within the control of a governmental board and it was not available to the public generally. That information had not been disclosed through resort to statutory procedures available under Massachusetts law, G.L. c. 66, §10, but rather it was disclosed surreptitiously by unidentified confidential sources.

In reversing the judgment of contempt, the Supreme Judicial Court considered the validity of the order that had entered in the trial court on November 23, 1987 whereby the trial court refused to compel the reporter, Radin, to answer twenty-eight specific questions

set forth in the Appendix at A40.[8] In so doing, the Supreme Judicial Court held that the trial court "was warranted in balancing Sinnott's need for the information against possible damage to the free flow of information" and that it was proper for the trial court "to consider the investigative purpose of and public interest in Radin's use of confidential sources." See A16-A17, citing Von Bulow v. Von Bulow, 811 F.2d 136, 142-143 (2d Cir.), cert. den. sub nom. Reynolds v. Von Bulow, 107 S.Ct. 1891 (1987), quoting Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), cert. den.

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[8] That order had been reversed by a subsequent order of a Single Justice of the Appeals Court. See Appendix, A22.

411 U.S. 966 (1973).[9]

The Supreme Judicial Court decided the case in terms of abuse of discretion by the trial court. Although the order of November 23, 1987 had been reversed by a Single Justice of the Appeals Court, the Supreme Judicial Court did not review the order of the Single Justice as such but did note distinctions between the order of the trial court and the order of the Single Justice. See A2.

What distinguishes the order of the trial court from that of the Single Justice is more than a mere difference in

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[9] Neither the Von Bulow case (which related to notes taken during the Von Bulow's criminal trial) nor Baker (which related to information furnished by a real estate agent) involve information maintained by a governmental entity which is not available to the public generally.

the exercise of discretion. The order of the trial court is founded upon the premise that there is a public interest in protecting the free flow of information of the type in issue, i.e. information not available to the public generally, information which as a matter of policy and practice had not been disclosed in the past. By contrast, as the Supreme Judicial Court noted "the single justice's own balancing of the asserted interest led her to conclude that she could not 'discern any public interest to be served by protecting the 'free flow' of information to which the public has, at best, limited and restricted access." A11-A12. In so concluding the Single Justice had relied upon state law, G.L. c. 4, §7 twenty-

sixth (c) and G.L. c. 66, §10, as construed in Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983).[10]

If the principles Branzburg v. Hayes, supra., and Houchins v. KQED, Inc., supra. are controlling, the premise upon which the exercise of discretion by

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[10] In Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427 (1983), the court resolved a controversy between the Retirement Board and The Boston Globe which arose when the Board refused to release information concerning completed pension applications to the newspaper. The Court held that the medical certificates relied upon by the Board in granting disability pensions were exempt from mandatory disclosure under state law, G.L. c. 66, §10(b) and G.L. c. 4, §7 twenty-sixth (c). The court stated that it saw no distinction between the medical certificate and the application which described the injury and basis for the application stating "our reasoning applies with equal force to the application." Id., n. 23.

the trial court was based is inconsistent with those principles. If the press has no constitutionally protected right of access to information not available to the public generally, it is an error of law to consider the impact of compelled disclosure on the free flow of information to which the press has no right of access.

In holding that the trial court was warranted in considering the potential damage to the free flow of information under these circumstances, the Supreme Judicial Court has departed from the decisions of this Court. This Court has not addressed the question of protections available (if any) under the First Amendment where the reporter is a so-called "investigative" reporter as

distinguished from other reporters.

The impact of the decision of the Supreme Judicial Court extends beyond the action of Sinnott v. State-Boston Retirement Board et al. The use of confidential sources by so-called investigative reporters has flourished in the post-Watergate era. In some instances, the information "leaked" is in the public domain. However, in other instances the information is private and not subject to disclosure. In light of the decision of the Supreme Judicial Court, there is a need to clarify the principle that the First Amendment does not guarantee a special right of access to governmental information and to resolve the inconsistency created by the decision of the Supreme Judicial Court.

If the information disclosed is not available to the public generally, consideration of the potential damage to the free flow of information undermines the rule that the First Amendment does not guarantee reporters rights of special access to restricted information. There is a need for a determination by this Court whether the public has a greater interest in protecting information not available to the public generally from wrongful, unauthorized disclosure which is superior to any assertion of damage to the free flow of such information.

Guidelines from this Court are necessary to avoid a situation where individual public officials or employees are free to establish ad hoc standards according to their own ideas of what

should be disclosed to reporters regardless of state law to the contrary. If reporters can be exempted from providing evidence concerning the identity of confidential sources who have disclosed information not available to the public generally, laws, regulations and rules restricting access to governmental information would be undermined.

The manner of disclosure in this case is particularly important to a consideration of the First Amendment implications. Massachusetts has an established statutory procedure under G.L. c. 66, §10 for obtaining access to governmental information. It was that procedure which had been followed in the case of Globe Newspaper Co. v. Boston

Retirement Board, supra.

In Massachusetts, a person seeking access to governmental information can challenge a refusal to release the information. Such a challenge would require a balancing between the seriousness of any invasion of privacy and the public's right to know. Attorney General v. Collector of Lynn, 377 Mass. 151 (1979) citing Hastings & Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812, 818-819 (1978). It has been held that in analyzing any claim of exemption from disclosure, the public's right to know should prevail "unless disclosure would publicize 'intimate details' of a 'highly personal nature'." Attorney General v. Assistant Commissioner of Real Property, 380 Mass.

623, 626 (1980). State law clearly contemplates a review prior to disclosure even in those cases where a public official or employee may be involved. Such review was by-passed in this case.

"The constitution itself is neither a Freedom of Information Act nor and Official Secrets Act." Stewart, "Or of the Press," 26 Hastings LJ 631, 636 (1975) quoted in Houchins v. KQED, Inc. supra. at 14. The decision of the Supreme Judicial Court raises significant First Amendment issues which require that this Court balance the competing interests of an individual's expectation that governmental information will be disclosed according to established principles and not on the basis of a unilateral decision of an individual

employee or reporter. Review by this Court is necessary to ensure that the press and media, particularly those designated as "investigative" reporters, are not viewed as being best qualified to discover and expose alleged malfeasance in public institutions without the necessity of affording affected individuals with the fundamental substantive and procedural protections which lie at the foundation of an orderly government. See Houchins v. KQED, Inc., supra. at 14; Garland v. Torre, 259 F.2d 545, 549 (2d Cir.) cert. den., 358 U.S. 910 (1958).

II. The fair administration of justice requires that a litigant be afforded an opportunity to obtain impeachment evidence and the First Amendment considerations

should not be construed to frustrate that principle.

This case also raises issues concerning the public interest in the fair administration of justice and the right of a litigant to obtain evidence necessary to establish his claim. "'(T)he public has a right to every man's evidence,' except for those persons protected by a constitutional, common law or statutory privilege...." Branzburg v. Hayes, 408 U.S. at 688.

Massachusetts does not have a shield law establishing a reporter's privilege. The Supreme Judicial Court "has consistently held that there is no constitutionally based reporter's privilege (either qualified or absolute) under either the First Amendment or art.

16 [of the Declaration of Rights to the Constitution of the Commonwealth]." Petition for the Promulgation of Rules, 395 Mass. 164, 171 (1985).

Massachusetts, like other states, has a statute which protects persons against "unreasonable, substantial or serious interference with his privacy." G.L. c. 214, §1B. The statute has been interpreted to proscribe "required disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate countervailing interest." Cort v. Bristol-Myers Co., 385 Mass. 300, 307-308 (1982). Sinnott has relied upon this statute in seeking redress from the courts of the Commonwealth for the unauthorized disclosure of his pension

application.

To establish his claim, Sinnott must prove that the disclosure was made, that the disclosure related to "facts ... of a highly personal or intimate nature Cort v. Bristol-Myers Co., supra., that the disclosure was unreasonable and that the defendants in the action were legally responsible for the disclosure.

The Superior Court action has been pending for six years. It has not languished. Rather, there have been extensive pre-trial proceedings which include not only discovery and depositions but also motions for summary judgment. There has been a decision of the trial court denying summary judgment wherein it was held that there are triable issues of fact.

Much of the discovery has related to obtaining evidence concerning the identity of the sources of the information in the Sinnott application to determine whether those sources include the defendants or whether the defendants were otherwise involved in the disclosure. Twenty-seven individuals have been deposed during thirty-nine sessions.

In Garland v. Torre, 259 F.2d supra. cited with approval in Branzburg v. Hayes, supra., two CBS executives who had allegedly induced the publication of libellous remarks were deposed and denied making the remarks or knowing who did. Thereafter, the reporter was deposed. His claim of privilege to refuse to disclose the identity of his sources was

rejected. The Court stated at p. 549:

> If ...the freedom of the press ... is here involved it too must give place under the Constitution to a paramount public interest in the fair administration of justice. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

"The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." United States v. Nixon, 418 U.S. 683, 709 (1974).

"(A) subpoena has never been treated as an invitation to a game of the hare and hounds in which the witness must testify only if cornered at the end of the chase." United States v. Bryan, 339 U.S. 323, 331 (1950).

The course of discovery in the Superior Court action has been a game of the hare and hounds, a game of "catch me if you can". The candor of the deponents (at least of certain of them) is perhaps best reflected in Radin's argument in his reply brief filed with the Supreme Judicial Court wherein at p. 19 Radin argued that the First Amendment considerations in the case are so compelling that the Court should disregard the fact that witnesses may have lacked the candor to assume responsibility for their conduct. Loosely translated that suggests "acceptable perjury". Although the Supreme Judicial Court glosses over the question of "acceptable perjury", it has previously held that a news reporter has

"a duty to reveal perjury, when the knowledge that such an act has been committed is based solely on confidential information." Matter of Roche, 381 Mass. 624, 630 (1980).

The relationship between a reporter and his source is a confidential one and thus secretive. Particularly in a civil action, where the identity of a source is at issue (as it is in this case[11]), there

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11 The Supreme Judicial Court asserted that there was a "lack of a clear demonstration of reasons for a need to know the precise identity of Radin's sources." A17-A19. By contrast, the Single Justice concluded that Sinnott had "shown a real need for the information". A34. In the Complaint filed in the Superior Court action, Sinnott alleged that the defendants Gately, Hicks, Cook and Leahy wrongfully permitted persons not authorized by law to gain access to the information in issue. Complaint ¶21. It was also alleged that the defendants Carroll and White wrongfully and knowingly caused the disclosure of the information in issue. Non-consensual

is an inherent risk that, as suggested by Radin, a source will lack the courage to assume responsibility for his conduct by falsely testifying. That risk may be a calculated one where the source has obtained a promise of confidentiality and he knows that the reporter will refuse to disclose his identity and resist any attempts to compel him to disclose his identity. A review of the depositions testimony which is replete with memory lapses, denials and inconsistencies demonstrates that risk is more than a mere possibility in this case.

The order compelling Radin to

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disclosure has been held sufficient to constitute a violation of G.L. c. 214, §1B. Bratt v. International Business Machines Corp., 392 Mass. 508, 518 (1984).

testify was limited to twenty-eight questions. Twenty-seven of those questions specifically related to persons who had been deposed and who had denied or, by virtue of their claim of privilege, effectively denied disclosing the information in issue to Radin or knowing who did.

In these circumstances, holding the First Amendment interest in protecting the free flow of information superior to the public interest in obtaining every person's evidence undermines the fundamental right of a plaintiff to obtain evidence necessary to prove his claim and undermines the public's interest in the fair administration of justice.

The Superior Court action is

concededly in the discovery phase. "A lawsuit, it has been well said, 'is not a sporting event, and discovery is founded upon the policy that the search for the truth should be aided.'" McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972) citing Tiedman v. American Pigment Corp., 253 F.2d 803, 808 (4th Cir. 1958).

Any claim of First Amendment protection should not be permitted to frustrate that search for truth or to suggest that there is acceptable perjury. A litigant's search for the truth through the judicial process may very well be a two edged sword. In seeking redress in the courts, a litigant may very well be forced to address and rebut counter-allegations such as those asserted in this case by Radin and by the defendants.

However, the allegations and counter allegations can only be resolved by a full and fair assessment of all relevant facts and circumstances presented at a trial on the merits. The First Amendment should not be used by litigants or by "investigative" reporters to frustrate that search for truth.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court.

Respectfully submitted,

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88-434

(2)

Supreme Court, U.S.
FILED
SEP 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD J. SINNOTT,
PETITIONER,

v.

CHARLES A. RADIN, STATE-BOSTON RETIREMENT BOARD, THOMAS W. GATELY, LOUISE DAY HICKS, NEWELL COOK, BRIAN LEAHY, HAROLD J. CARROLL AND KEVIN H. WHITE
RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court
No. S-4754

Richard J. Sinnott,
Plaintiff, Appellee,

v.

Boston Retirement Board & others
Defendants, Appellants

APPEAL FROM JUDGMENT OF CONTEMPT
OF THE SUPERIOR COURT AGAINST
CHARLES A. RADIN, NON-PARTY WITNESS

Before
Hennessey, C.J., Wilkins,
Abrams, Nolan, & Lynch, JJ.

E. Susan Garsh, (Jonathan M. Albano with her) for Charles A. Radin,
Regina L. Quinlan for plaintiff, Richard J. Sinnott,
Boisfeuillet Jones, Jr., Carol D. Melamed & Barbara P. Percival of the District of Columbia, for The Washington Post, amicus curiae, submitted a brief.
James C. Heigham, for Massachusetts

Newspaper Publishers Association, amicus curiae, submitted a brief.
Jane E. Kirtley & Susan E. Bray of the District of Columbia, & James E. O'Connell, Jr., for Reporters Committee for Freedom of the Press, amicus curiae, submitted a brief.

June 13, 1988

LYNCH, J. This is an appeal from a judgment of civil contempt entered in the Superior Court, pursuant to an order of a single justice of the Appeals Court,[1] against a deponent, Charles A. Radin, a newspaper reporter, for refusing to comply with an order that he answer questions aimed at discovering the identities of confidential sources. We

1 We do not review the underlying order of the single justice of the Appeals Court which was an interlocutory order granted within the discretion accorded in G. L. c. 231, § 118, par. 1 (1986 ed.).

transferred the case to this court on our own motion and now reverse.

On April 5, 1982, The Globe Newspaper Company published an article, authored by Radin, concerning, inter alia, the application by Richard J. Sinnott (Sinnott) , a recently fired chief of the licensing division of the city of Boston, for an accidental disability pension. The article appeared in the wake of a "Globe Spotlight" report detailing alleged abuses in the awarding of pensions by the Boston Retirement Board (board). According to the article, the contents of Sinnott's accident statement, made by him as part of his application to the board, were "shared with a Globe reporter by City Hall sources." As reported in the newspaper article, Sinnott attributed his

disability to the emotional impact of his attendance, in his capacity as "city censor," at two 1979 rock concerts and at a "frenzied" licensing hearing during which a participating attorney died.

Five weeks after the article appeared, Sinnott commenced this action against the board, its members, and other city officials. The complaint alleges invasion of privacy in violation of G. L. c. 214, §§ 1B and 3B (1986 ed.) (counts 1 and 2), and a count said to be based on the plaintiff's First Amendment rights and Ninth Amendment privacy rights, in violation of 42 U.S.C. § 1983 (1982) (count 3).

On August 29, 1985, Sinnott subpoenaed Radin to attend a deposition and produce various documents, including

any and all which would "identify the 'sources' referred to" in the article. Relying on (1) the First Amendment to the United States Constitution; (2) art. 16 of the Declaration of Rights of the Massachusetts Constitution; (3) Mass. R. Civ. P. 26 (c), 365 Mass. 772 (1974), and Mass. R. Civ. P. 45, as amended, 387 Mass. 1222 (1983); and (4) the common law, Radin moved to quash the subpoena. The motion was denied on July 16, 1986, without prejudice for its renewal during the course of Radin's deposition. On July 31, 1986, Radin refused to answer any questions which might lead to the identification of three confidential sources. Radin renewed his motion to quash or, in the alternative, for a protective order, and Sinnott filed a

motion to compel further testimony, pursuant to Mass. R. Civ. P. 37 (a), 365 Mass. 797 (1974).

On August 8, 1986, a judge in the Superior Court granted Radin's motions on the ground, inter alia, that there had been no showing that the information sought by Sinnott was not "equally available to the plaintiff were he willing to undertake the investigative effort made by Mr. Radin, "[2].

On December 5, 1986, the same Superior Court judge issued findings of fact and rulings of law on the above noted motions

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2 It can be deduced from the record that, of the fifteen individuals identified by the board in its answer to an interrogatory as having access to the plaintiff's pension application, four had not been deposed prior to the August 8, 1986, order.

and denied Sinnott's motion to compel discovery. Applying the principles and considerations enunciated in Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Information, 395 Mass. 164 (1985), the judge weighed Sinnott's interest in obtaining the names of the individuals who allegedly wrongfully divulged to Radin the information contained in Sinnott's pension application against Radin's and the public's interest in protecting the confidential nature of his sources. This balancing was conducted as a necessary component of the analysis required under Mass. R. Civ. P. 26 (c) to "assess the competing interests of preventing 'annoyance, embarrassment, oppression, or

undue burden or expense,' . . . and considerations of an efficient and just resolution of the action." Wansong v. Wansong, 395 Mass. 154, 156 (1985). Concluding that "the public interest in protecting the free flow of information," Petition for Promulgation of Rules, supra at 172, as demonstrated by the reforms which were in part attributable to the investigative journalism conducted by The Globe Newspaper Company, outweighed the questionable necessity,[3] of the sources'

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[3] While the judge questioned whether Radin had standing to argue that Sinnott's complaint failed to state a claim upon which relief can be granted, he considered and rejected Sinnott's contentions that the precise identities of the sources went to the "heart of the claim." See Dow Jones & Co. v. Superior Court, 364 Mass. 317 (1973). Indeed, the judge reasoned,

names for Sinnot's case and noting the availability of alternative methods of discovery, the judge denied Sinnott's motion to compel discovery.

The motion judge thereafter denied a subsequent motion to vacate his two previous orders and to compel discovery on the grounds that Sinnot failed to

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> "[I]t is unclear in the instant case why plaintiff needs to know the precise identity of Radin's sources. Plaintiff alleges defendants violated his right to privacy by permitting the contents of his application to be released to Radin against Board policy. . . . There is no question that Radin is not a person authorized to have such access, nor is there any question that Radin did have access." Therefore, the inquiry as to the sources' identities was deemed "more of a 'needless disclosure of confidential relations' than a question that goes to the 'heart of plaintiff's case.'"

present substantial reasons warranting relief from judgment, pursuant to Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974), and that there continued to exist alternatives to compelled disclosure.

Sinnott sought relief from a single justice of the Appeals Court, pursuant to G. L. c. 231, § 118 (1986 ed.). The single justice granted the petition to vacate the previous orders of the Superior Court and remanded the case for entry of an order requiring Radin, inter alia, to disclose his sources. In so doing, the single justice independently applied the considerations set out by Petition for the Promulgation of Rules, supra at 171-173, and concluded that (1) "the public disclosure of the personal information here in issue is

subject to serious limitations and restrictions"; (2) "[i]n view of the nature of the plaintiff's cause of action and the allegations set out in his complaint . . . the plaintiff has shown a real need for the information"; (3) the plaintiff's "endeavors [to secure the information from alternative sources] cannot be characterized as minimal"; and (4) "it has not been shown that the 'asserted damage to the free flow of information is more than speculative or theoretical.'"

In sum, the single justice's own balancing of the asserted interests led her to conclude that she could not "discern any public interest to be served by protecting the 'free flow' of information to which the public has, at

best, limited and restricted access."

Pursuant to the single justice's ruling, on February 10, 1988, a Superior Court judge entered an order requiring Radin to disclose his sources. On February 18, 1988, after resuming Radin's deposition, Sinnott moved for an order holding Radin in civil contempt for failing to comply. Sinnott's motion was allowed and Radin was ordered incarcerated until he provides testimony concerning the sources for the article. That order has been stayed pending appeal.

It is apparent that the contrary rulings of the Superior Court judge who denied Sinnott's motions to compel and of the single justice of the Appeals Court are premised on divergent views of

the strength of Sinnott's underlying claims for invasion of privacy. We need not, nor on this record with the case in its current posture do we think it appropriate to, resolve the various open questions involved in determining whether Sinnott's complaint states a claim under G. L. c. 214, §§1B or 3B. The narrow question on review in this case is whether the Superior Court judge's denials of the motions to compel and the motion to vacate those orders constituted an abuse of the "broad measure of discretion" accorded him. Matter of Roche, 381 Mass. 624, 638 (1980), citing Matter of Pappas, 358 Mass. 604, 614 n.13 (1971). "An adjudication of civil contempt against a nonparty constitutes a final judgment appealable pursuant to

Mass. R. A. P. 1 (c), 365 Mass. 844 (1974)," and "[the] validity of an underlying discovery order, disobedience of which has led to an adjudication of contempt, may be challenged on appeal from the adjudication of contempt," Matter of Roche, supra at 625 n.1. In these circumstances, we review the rulings of the Superior Court judge denying the motion to compel and granting a protective order. Unless that ruling constituted an abuse of discretion, there is no basis for the judgment of contempt. See Baker v. F & F Inv., 470 F.2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). We discern no such abuse of discretion and, therefore, reverse the adjudication of civil contempt.

It is well settled that, in supervising discovery, a presiding judge is "obliged to consider the effect that compelled discovery would have on 'the values protected by the First Amendment, [even] though [these values were] entitled to no constitutional privilege.'" Matter of Roche, supra at 636, quoting Herbert v. Lando, 441 U.S. 153, 180 (1979) (Powell, J., concurring). The "needless disclosure of confidential relationships," Matter of Roche, supra at 637, is, therefore, to be avoided. While "[a] judge ruling on discovery requests must also take into account considerations of efficiency and economy," id., the critical inquiry, once there is "some showing that the asserted damage to the free flow of information is

more than speculative or theoretical," Petition for the Promulgation of Rules, supra at 172, requires "a balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information." Id.

The Superior Court judge was warranted in balancing Sinnott's need for the information against possible damage to the free flow of information,[4]. Nor can it be concluded that the Superior Court judge's view of the appropriate balance in this case was unwarranted by the record or based on an unreasonable

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[4] At his deposition, Radin testified to having three confidential sources. He would not divulge whether they were among various individuals already deposed. Contrast Matter of Roche, supra at 635.

assessment of several areas of unsettled law. Although this court has not recognized the existence of any special status for the institutional press with regard to First Amendment or art. 16 interests, see Matter of Roche, supra at 631-632 n.9; Commonwealth v. Corsetti, 387 Mass. 1, 4 (1982), it was not improper for the judge to consider the investigative purpose of and public interest in Radin's use of confidential sources. Cf. Von Bulow v. Von Bulow, 811 F.2d 136, 142-143 (2d Cir.), cert. denied sub nom. Reynolds v. Von Bulow, 107 S. Ct. 1891 (1987), quoting Baker v. F & F Inv., supra at 782 (explaining that the public interest in nondisclosure rested upon the concern that "the deterrent effect such

disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed'"),[5]. His assessment of the relative weight of these public interests cannot be said, as a matter of law, to be incorrect, especially in light of the questionable viability of Sinnott's invasion of privacy claims and the lack of a clear demonstration of reasons for a need to

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5 We stress, however, that, as noted by the judge, it is the protection for "information gathering [which] must exist if the First Amendment is to serve adequately the central purpose of facilitating intelligent decisions by self-governing people," Matter of Roche, supra at 632, rather than the evidence that, in this case, reforms actually resulted from the "Globe Spotlight" series.

know the precise identity of Radin's sources. Further, he correctly considered the availability of alternative sources, and, although Sinnott's efforts to pursue other avenues were not minimal, neither can it be said that, on balance, the existence of other potential sources was insignificant.

In addition to making arguments in support of the balance reached independently by the single justice of the Appeals Court, Sinnott focuses his argument on the extensive discovery already undertaken. His central argument is that to be required to continue depositions would be "to continue a game of hare and hounds," especially where, as here, all individuals previously deposed have either denied disclosing to Radin

or have refused to answer on Fifth Amendment grounds. Relying on Matter of Roche, supra, he contends further that, at the very least, Radin should be required to disclose to the extent necessary to determine whether any of the defendants perjured themselves. As to the gamesmanship argument, we need say nothing more than has already been said regarding the discretion of the motion judge. With regard to the possible existence of perjury in this case, we do not view such a possibility as so likely or so central to the case as to constitute grounds for disturbing the ruling of the motion judge. We therefore reverse the judgment of contempt against Charles A. Radin and the February 10, 1988, order directing him to answer

deposition questions. The case is remanded for further proceedings consistent with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 87-0673-CV

RICHARD J. SINNOTT

v.

STATE-BOSTON RETIREMENT BOARD & others.[1]

MEMORANDUM AND ORDER

Pursuant to G.L. c. 231, §118, the plaintiff seeks relief from an order of the Superior Court denying his motion to compel disclosure by Charles A. Radin (Radin) of the identity of his sources of certain information used in preparing an article published in the Boston Globe and

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[1] Thomas W. Gately, Louise Day Hicks, Newell Cook, Harold J. Carroll, Brian M. Leahy, and Kevin H. White, and Charles A. Radin.

concerning the plaintiff. After hearing argument, I conclude that the plaintiff is entitled to relief on his petition for the following reasons.

I. THE PLAINTIFF'S CAUSE OF ACTION.

The plaintiff's action is brought under G.L. c. 214, §1B, and alleges, basically, that the defendants, directly or indirectly, violated his right of privacy by allowing or failing to prevent disclosure and dissemination of his application for a disability pension. The defendants are the State-Boston Retirement Board (board), the board's individual members and executive officer, the City of Boston's corporation counsel, and the Mayor, all as of May 14, 1982. Radin is not a defendant but he has been named as a respondent on the plaintiff's

petition under G.L. c. 231, §118.

General Laws, C. 214, §1B, inserted by St. 1973, c. 941, provides in pertinent part that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy." As stated in Bratt v. International Business Machines Corp., 392 Mass. 508, 518 (1984): "This court has interpreted §1B to proscribe the required disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate, countervailing interest. See, e.g., Court v. Bristol-Meyers Co., 385 Mass. 300, 307-308 (1982)." See also Cefalu v. Globe Newspaper Co., 8 Mass. App. Ct. 71, 77 (1979) ("The notion of right of privacy is founded on the idea

that individuals may hold close certain manuscripts, private letters, family photographs, or private conduct which is no business of the public and the publicizing of which is, therefore, offensive").

II. THE NATURE OF THE DISCLOSED INFORMATION.

On April 5, 1982, an article by Radin appeared in the Boston Glove in which it was disclosed that the plaintiff had applied to the board for a disability pension. The cause and the nature of the disability as given by the plaintiff in his written application to the board were quoted from the application itself. The disclosed information carried the following attribution: "according to sources." The article also revealed that when the plaintiff was asked to comment

upon his application and its contents, he declined to do so, adding that he "thought all of this was supposed to be confidential."

As I read Globe Newspaper co. v. Boston Retirement Board, 388 Mass. 427 (1983), the information reported by Radin was "absolutely exempt from mandatory disclosure." Id. at 438. See G.L. c. 4, §7 twenty-sixth (c), as amended by St. 1977, c. 691, §1, and G.L. c. 66, §10. Although the disclosure of the information subject to an exemption to G.L. c. 66, §10, cannot be compelled, that restriction does not apply to a "voluntary and nondiscriminatory disclosure" of the information, "subject to the rights and privileges of persons named therein." Town Crier, Inc. v.

Chief of Police of Weston, 361 Mass. 682, 691-692 (1972). See also Dunn v. Board of Assessors of Sterling, 361 Mass. 692, 685-696 n.6 (1972). In short, Radin could not have compelled the board to provide him with the information he reporter in his article.

Further, I need not consider whether the board could have furnished the information voluntarily to Radin upon appropriate request. Cf., e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 292-293 (1979); General Chem Corp. v. Department of Environmental Quality Engineering, 19 Mass. App. Ct. 287, 291-292 n.3 (1985), and cases therein collected. It appears from an offer of proof made by the plaintiff, well referenced to documentary evidence and depositions, that the board

had a promulgated policy against disclosure of disability pension applications and medical certificates on the basis that the information therein contained fell outside the scope of "public records." Only those persons involved in processing the applications had access to the information under the board's policy. Disclosure could be made only upon vote of the board members. This was not done, ad each of the defendants deny disclosing the information. Finally, the fact that disclosure was made by three unidentified sources to Radin (according to Radin) in no way vitiates the policy that the board chose to adopt and promulgate. See Bougas v. Chief of Police of Lexington, 371 Mass. 59, 63 (1976); Connolly v.

Bromery, 15 Mass. App. Ct. 661, 665 (1983). Cf., Chrysler Corp. v. Brown, 441 U.S. at 293 n.14, 5 U.S.C. §552a.

Additionally, I think it worthy of some note that the records here in question "are necessary to the work of the . . . Board[]," Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. at 440 n.21, as compared to reports which are "of some usefulness to the general public." Id. at 441 n.23. The information here disclosed far exceeds that deemed permissible in Globe Newspaper Co. v. Boston Retirement Board and falls squarely within that found to be exempt from mandatory disclosure. Id., at 438. In summary, as I read the relevant authorities, the public has an interest in and the right to know how its

municipal employees are administering the disability pension program and the expenditure of public funds. However, when specific entries on a particular, identified application are discriminatorily disclosed, revealing "intimate details of a highly personal nature," the employee's privacy interest outweighs the public interest served by disclosure of the personal information. Getman v. NLRB, 450 F. 2d 670, 675 (D.C. Cir. 1971). See Town Crier, Inc. v. Chief of Police of Weston, 361 Mass. at 691-692; Dunn v. Board of Assessors of Sterling, 361 Mass. at 695-696 n.6; Glove Newspaper Co. v. Boston Retirement Board, 388 Mass. at 437. See also Columbia Packing Co. v. U.S. Dept. of Agriculture, 417 F. Supp. 651, 655 (D. Mass. 1976),

off'd., 563 F. 2d 495 (1st Cir. 1977). I conclude that public disclosure of the personal information here in issue is subject to serious limitations and restrictions.

III. REFUSAL TO REVEAL THE SOURCES.

All the controlling authority concerning a reporter's claim of right to refuse to divulge the sources of information given in confidence have been collected and discussed recently in Petition for the Promulgation of Rules, 395 Mass. 164 (1985), and need not be elaborated upon herein. Rather, I apply those considerations set out at pages 171-173 to the present circumstances.

On August 8, 1986, December 5, 1986, and November 23, 1987, the Superior Court judge refused to compel Radin to disclose

the sources of his information for the reason, as stated in his third order, that the plaintiff "still has alternate route available other than compelling Radin to reveal his source." The plaintiff has described in detail in paragraphs seven through fourteen of his petition (with attached affidavits and other documentation) the steps he has taken to secure the information he seeks from sources other than Radin, when those steps were taken, and how they proved fruitless. These endeavors cannot be characterized as minimal nor, presumably, as inexpensive considering the number of depositions conducted. As described by the plaintiff, all persons having access to the plaintiff's files have been deposed and have denied disclosure of the

information to Radin. Notwithstanding these endeavors, the plaintiff has been given no hint, clue, or suggestion as to what more he can and should do. Although the denials of his motions to compel have been accompanied by this stated ground, I do not think that in the circumstances here presented, that stated basis for the orders of denial any longer constitutes an "explanation" as contemplated in Petition for the Promulgation of Rules, 395 Mass. at 173.

In view of the nature of the plaintiff's cause of action and the allegations set out in his complaint,[2] I

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[2] The defendants' joint motion for summary judgment alleging, among other things, that the plaintiff has no right of privacy in his disability pension application, was denied on July 11, 1986.

further conclude that the plaintiff has shown a real need for the information and is not seeking Radin's sources for purposes of harassment. Id., at 171-172. Critical to my decision is my further conclusion that it has not been shown that the "asserted damage to the free flow of information is more than speculative or theoretical." Ibid., at 172, citing Matter of Roche, 381 Mass. 624, 635 (1980). The Legislature has determined that the information here revealed should not flow freely but should be restricted by an "individual's interest in personal privacy." Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. at 437. I cannot, therefore, discern any public interest to be served by protecting the "free flow" of

information to which the public has, at best, limited and restricted access. See Petition for the Promulgation of Rules, 395 Mass. at 172-173.

IV. SUMMARY

The plaintiff-petitioner is entitled to relief from the order of the Superior Court judge erroneously denying his third motion to compel Radin to respond to certain questions concerning the sources of his information relating to the plaintiff's disability pension application. I am not unmindful of the possible consequences of my order. However, I think it inappropriate at this time to stay my order or entertain any requests to report my decision or grant leave to appeal. The reasons for this are that Radin is not a party to the

action and the consequences of my order are, at this stage, simply possibilities. Any appeal at this time, therefore, would be premature and any relief that might be sought is better left to a later stage (if such there be) of the proceedings.

Accordingly, the order of the Suffolk Superior Court entered in case no. 54952 on that court's docket on November 23, 1987, denying the plaintiff's motion to vacate prior orders and to compel discovery from deponent Charles A. Radin, is reversed. The matter is remanded to that court for the entry of a new order requiring that the deponent Charles A. Radin answer those twenty-eight questions set out in Exhibit 1 to the plaintiff's motion of September 29, 1987.

All until further order of the court or a single justice thereof.

By the Court (Perretta, J.)

Assistant Clerk

Entered: January 27, 1988

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO. 54952

* * * * * * * * * * * * * * * * * *

RICHARD J. SINNOTT,
Plaintiff

v.

STATE-BOSTON RETIREMENT BOARD, ET AL.,
Defendants

* * * * * * * * * * * * * * * * * *

ORDER

Pursuant to the Order of the Single Justice of the Appeals Court (Perretta, J.) dated January 27, 1988, and Docket No. AC-87-0673-CV, the Deponent, Charles A. Radin is hereby ordered to answer those questions numbered 1-28 as set out in Exhibit 1 to the plaintiff's Motion

dated September 29, 1987 and entitled Plaintiff's Motion to Vacate Orders Dated August 8, 1986 and December 5, 1986 and to Compel the Deponent Charles A. Radin to Answer Certain Questions. (A copy of the questions is annexed hereto).

The said Charles A. Radin is further ordered to appear at the office of the plaintiff's attorney, Regina L. Quinlan, 6 Beacon Street, Suite 300, Boston, MA 02108 at 2:00 p.m. on February 18, 1988 to provide answers to those questions in accordance with this Order.

_____

By the Court:

Date: February 11, 1988

EXHIBIT 1

QUESTIONS PROPOSED TO BE ANSWERED
UNDER OATH BY THE DEPONENT,
CHARLES A. RADIN

The plaintiff, Richard J. Sinnott, proposes that the deponent Charles A. Radin be compelled to answer the following questions under oath:

1. Did THOMAS W. GATELY provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

2. Did LOUISE DAY HICKS provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

3. Did BRIAN M. LEAHY provide you with

any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

4. Did NEWELL COOK provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

5. Did HAROLD CARROLL provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982 in addition to the any information attributed to him in the article dated April 5, 1982?

6. Did KEVIN H. WHITE provide you with any information concerning the

pension application of Richard J. Sinnott prior to April 5, 1982?

7. Did GEORGE K. REGAN, JR. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

8. Did SUSAN MORGAN provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

9. Did THEODORE V. ANZALONE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

10. Did JOANNE PREVOST ANZALONE provide

you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

11. Did MELISSA JAD provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

12. Did JERRY COLELLA provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

13. Did JAMES MC DAVITT provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

14. Did GEORGE MC MASTERS provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

15. Did JOHN CULLEN provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

16. Did FRANCES MC MANUS provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

17. Did DENNIS MORGAN provide you with any information concerning the pension application of Richard J.

Sinnott prior to April 5, 1982?

18. Did KATHERINE KANE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

19. Did THOMAS FRANCIS, JR. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

20. Did RONALD C. BRINN provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

21. Did JOAN SCHLOSS, ESQ. provide you with any information concerning the

pension application of Richard J. Sinnott prior to April 5, 1982?

22. Did KELAM S. DEDERIAN, ESQ. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

23. Did GERALD J. MC TERNAN, ESQ. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

24. Did MICHO SPRING provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

25. Did BENJAMIN KILGORE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

26. Did THOMAS ARCADIPANE provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

27. Did THOMAS A. HICKEY, III, ESQ. provide you with any information concerning the pension application of Richard J. Sinnott prior to April 5, 1982?

28. If your answers to all of the preceding question is "No.", please

identify by name the person or persons who provided you with information concerning the pension application of Richard J. Sinnott prior to April 5, 1982.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION
NO. 54952

RICHARD J. SINNOTT,
Plaintiff

v.

STATE-BOSTON RETIREMENT
BOARD, ET AL.,
Defendants

FINDINGS OF FACT, RULINGS OF LAW AND ORDER ON PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM DEPONENT, CHARLES A. RADIN

FACTS

Before the Court is a motion by plaintiff Richard J. Sinnott to compel deponent Charles A. Radin to produce documents and to respond to questions concerning confidential sources, and a motion by Radin to quash or, in the alternative, for a protective order.

The underlying suit -- to which

Radin is not a party -- is against the State-Boston Retirement Board, the Board's individual members, the Board's executive officer, the City of Boston's corporation counsel, and the City of Boston's mayor, all of whom were in office as of May 14, 1982.

The subject matter of the underlying suit concerns an article written by Radin and published in The Boston Globe, concerning Sinnott's application for disability pension filed with defendant State-Boston Retirement Board. Plaintiff's claim is based on the allegedly wrongful release of this information to Radin.

Radin claims his three sources of information are confidential and that he need not divulge their names to

plaintiff. Plaintiff, on the other hand, seeks an order to compel Radin to divulge the names, claiming that they are essential to proving his claim.

On July 16, 1986, Radin's motion to quash was denied "without prejudice to seek protective relief if appropriate when the deposition is in progress." On July 30, 1986, plaintiff began to depose Radin, and Radin refused to answer questions which "would identify, or would tend to identify, the confidential source(s) used . . . in preparing the Article. . . ."

Plaintiff and Radin, for the purposes of these motions, have stipulated to certain facts. The stipulations are hereto attached.

Radin's arguments are essentially:

(1) plaintiff's complaint fails to state a claim upon which relief can be granted; (2) the interests in preserving Radin's pledge of confidentiality to his sources outweigh plaintiff's interest in discovery; and (3) plaintiff has failed to exhaust alternative means of obtaining the identity of the sources. See Memorandum of Charles A. Radin In Support of His Renewal Motion to Quash or, In The Alternative, For A Protective Order.

DISCUSSION

Of Radin's three arguments, only the second is worthy of much discussion. As a non-party, Radin probably has no standing to raise plaintiff's failure to state a claim. More importantly, defendants have raised the issue in a motion for summary judgment which was

denied.

Radin's third argument -- that plaintiff has not exhausted all alternative remedies -- is but one factor to consider in balancing Radin's right to protect his confidential sources against plaintiff's right to obtain the names of those sources. See In Re Roche, 448 U.S. 1312, 1315-1316 (1980).

The real question for discussion, then, is to "assess the competing interests of preventing 'annoyance, embarrassment, oppression, or undue burden or expense,' . . . and considerations of an efficient and just resolution of the action." Wansong v. Wansong, 395 Mass. 154, 156 (1985).

The United States Supreme Court has declined to grant newsmen a testimonial

privilege under the First Amendment not enjoyed by other citizens. Branzburg v. Hayes, 408 U.S. 633, 690 (1972).

The Supreme Judicial Court of Massachusetts has also declined to establish a common law reporter's privilege. Petition for the Promulgation of Rules, 395 Mass. 164, 165 (1985).

Neither the U.S. Supreme Court nor the Supreme Judicial Court, however, has left the press without any rights to protect sources. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Bransburg v. Hayes, supra at 681. "Some protection for such information gathering must exist if the First Amendment is to serve adequately its central purpose of facilitating

intelligent decisions by self-governing people." In the Matter of Roche, 381 Mass. 624, 632 (1980).

The Supreme Judicial Court in its Petition opinion, discussed a number of factors to be weighed in "balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information." 395 Mass. at 172. "[T]he availability of alternative remedies to compelled disclosure should be considered." Id. at 171. The trial judge should weigh the impact of compelled disclosure on values underlying the First Amendment and art. 16 of the Massachusetts Declaration of Rights, and to "prevent 'harassing' or the 'needless disclosure of confidential

relationships.'" Id. at 171-172.

In striking this balance, the Supreme Judicial Court has cautioned "that those seeking to prevent disclosure . . . must make some showing that the asserted damage to the free flow of information is more than speculative or theoretical." Id. at 172.

Radin has presented plaintiff and the Court with a list of eleven possible sources whom plaintiff has not deposed, plus two who have been deposed and who pled the Fifth Amendment privilege against self-incrimination. See List of Possible Alternative Sources of the Information Which Plaintiff Seeks to Obtain from Charles A. Radin.

Plaintiff argues that Radin should, at a minimum, disclose whether those

already deposed include his sources, or whether those on Radin's suggested list include the sources, so plaintiff can avoid any exercise in futility.

By not providing such clues, Radin is clearly attempting to avoid one of the pitfalls in Roche. In Roche, a television reporter refused to reveal confidential sources, but testified in deposition that his sources were among a list of some sixty-five people who might be called as witnesses. The Court found that Roche had for all practical purposes identified the sources and was merely dictating when they would be revealed, because plaintiff could have deposed all sixty-five and then, if not satisfied, deposed Roche and asked which person or persons perjured themselves.

In the instant case, the list presented by Radin merely picks out names revealed through other depositions as some people who had access to the records. It is not an exhaustive list, but merely proves that plaintiff had routes available other than compelling Radin to reveal his sources.

Plaintiff relies on a number of libel actions in which the courts have found that the name of the maker of the libelous statement was at the "heart of the claim," and ordered the reporter in question to reveal the name of the confidential source. See Garland v. Torre, 259 F. 2d 545 (2nd Cir. 1958), cert. denied 358 U.S. 910; Dow Jones & Company v. Superior Court, 364 Mass. 317 (1973).

In deciding the Dow Jones case, the Supreme Judicial Court distinguished it from Baker v. F & F Inv., 470 F. 2d 778 (2nd Cir. 1972), because in Baker, in addition to state legislation protecting journalists to some extent, the reporter in Dow Jones was a party to the underlying suit and plaintiffs had convinced the Court that the source names were essential to their action. 364 Mass. at 321.

Unlike the libel case, where the name of the person who made the libelous statement was essential, it is unclear in the instant case why plaintiff needs to know the precise identity of Radin's sources. Plaintiff alleges defendants violated his right to privacy by permitting the contents of his

application to be released to Radin against Board policy. Plaintiff's Memorandum in Opposition to Motion to Quash of Charles A. Radin at 22. There is no question that Radin is not a person authorized to have such access, nor is there any question that Radin indeed did have access.

If the inquiry is more than an exercise of curiosity on plaintiff's part, it seems more of a "needless disclosure of confidential relations" than a question that goes to the "heart of plaintiff's case."

CONCLUSION

The Supreme Judicial Court has noted "that the method of case-by-case adjudication involves a balancing between the public interest in every person's

evidence and the public interest in protecting the free flow of information." Petition for the Promulgation of Rules, 395 Mass. 164, 172 (1985).

The gains to the public achieved through the free flow of information are documented by Radin in Affidavit of Thomas R. Lussier, as it relates to the instant case. Lussier served as Deputy Commissioner of the Division of Public Employee Retirement Administration from January, 1983, to October, 1984. Lussier recites in his affidavit numerous reforms that resulted from the series of articles in The Boston Globe, of which the article about Sinnott was one part. The implication is clear that if Radin were compelled to testify and thus revealed his sources, such sources would cease to

exist in the future and such reforms would not take place.

When parties to the Watergate suit attempted to depose a number of reporters concerning their confidential sources, the D.C. District Court refused to compel the testimony. That court stated that the importance of the events "transcends anything yet encountered in the annals of American judicial history. Moreover, movants are not parties to the actions, but have merely been called to testify and produce documents at deposition. The parties on whose behalf the subpoenas were issued have not demonstrated that the testimony and material sought go to the 'heart of [their] claim,' as was found to be true in the case of Garland v. Torre (footnote omitted)." Democratic

National Committee v. McCord, 356 F. Supp. 1394, 1397 (D.D.C. 1973).

The reforms discussed above, together with the questionable necessity of the source names for plaintiff's case and the availability of alternate methods to discover those names, favor Radin's motion to quash or for a protective order over plaintiff's motion to compel disclosure.

ORDER

It is hereby ORDERED that plaintiff's motion to compel discovery from deponent Charles A. Radin is DENIED.

Thomas R. Morse, Jr.
Chief Justice of the
Superior Court

Dated: December 5, 1986

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.
SUPERIOR COURT

CIVIL

ACTION

NO.

54952

RICHARD J. SINNOTT,
Plaintiff

v.

STATE-BOSTON RETIREMENT
BOARD, ET AL.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION TO VACATE ORDERS DATED AUGUST 8, 1986 AND DECEMBER 5, 1986 AND TO COMPEL DEPONENT CHARLES A. RADIN TO ANSWER CERTAIN QUESTIONS

This matter is before the Court on the plaintiff Richard Sinnott's motion to vacate two earlier orders and to compel deponent Charles A. Radin ("Radin"), a newspaper reporter for the Boston Globe, to respond to questions concerning

confidential sources. Radin opposes the plaintiff's motion, and renews his motion to quash or, in the alternative for a protective order.

Plaintiff's suit against the defendants, State-Boston Retirement Board, et al., to which Radin is not a party, is based on G.L. c. 214, § 1B. That statute provides that "a person shall have a right against unreasonable, substantial or serious interference with his privacy." G.L. c. 214, §1B. Plaintiff alleges that the defendants violated his right of privacy under G.L. c. 214, §1B by permitting the contents of his pension application to be disseminated and released to the press. Radin used three sources of information in preparing the article published by the

Boston Globe newspaper concerning the plaintiff's pension application.

Plaintiff seeks to compel Radin to reveal the identity of his confidential sources on the grounds that the information is essential to the case. Radin, on the other hand, argues he need not divulge their names because his three sources of information are confidential.

On two earlier occasions, this court denied the plaintiff's motion to compel Radin to reveal his sources. Pursuant to Mass. R. Civ. P. 60(b), the plaintiff now moves to vacate these two earlier orders and compel disclosure. A motion under Mass. R. Civ. P. 60(b) for relief from judgment is addressed to the judge's discretion. The Trustees of the Stigmatine Fathers, Inc. v. Secretary of

Administration and Finance, 369 Mass. 562, 565 (1976). However, the reasons argued for relief must be substantial enough to warrant relief under Rule 60. Here, the plaintiff has essentially reargued the motion that was denied on December 6, 1986.

This Court finds that the plaintiff has not presented any valid grounds on which to disturb the previous two rulings. The plaintiff still has alternate routes available other than compelling Radin to reveal his source. Thus, this Court still favors Radin's motion to quash or for a protective order over the plaintiff's motion to compel disclosure. Accordingly, the plaintiff's motion to vacate the two earlier orders is denied.

ORDER

It is hereby Ordered that plaintiff's motion to vacate orders and to compel discovery from deponent Charles A. Radin is DENIED.

_____
Thomas R. Morse, Jr.

Justice of the
Superior Court

Dated: November 23, 1987

UNITED STATES CONSTITUTION

AMENDMENT 1

Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives -- Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, ~~excluding Indians not taxed.~~ But when the right to vote at any election for the choice of electors for President and Vice-President of the United States,

Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the

United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. Public debt not to be questioned -- Debts of the Confederacy and claims not to be paid.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

MASS. GENERAL LAWS C. 214, § 1B

§1B. Right of Privacy; Remedy to Enforce.

A person shall have a right against unreasonable, substantial or serious

interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

MASS. GENERAL LAWS C. 214, § 3B

§3B. Actions to Recover Actual or Punitive Damages for, or for Injunctions or Mandamus against, Disclosure of Personal Data by Holder.

Any holder, as that term is defined in chapter sixty-six A, which violates any provision of said chapter sixty-six A, shall be liable to any individual who suffers any damage as a result of such violations, and the individual damaged may bring an action against such holder to recover any damages sustained. Notwithstanding any liability for actual

damages as may be shown, such holder shall be liable for exemplary damages of not less than one hundred dollars for each violation together with such costs and reasonable attorney's fees as may be incurred in said action.

Any holder which violates or proposes to violate any of the provisions of chapter sixty-six A shall be subject to an action for injunction, declaratory judgment, or mandamus issued by any court of competent jurisdiction. The court may make such order or judgment as may be necessary to prevent any holder from employing practices which violate chapter sixty-six A. Actions for injunction or mandamus under this section may be prosecuted by an individual or by the attorney general in the name of the

commonwealth upon his own complaint or upon the complaint of any individual.

An action to enforce any liability created under chapter sixty-six A, may be brought in any court of competent jurisdiction within three years from the date in which the liability arises; provided, however, that where a defendant had materially or willfully misused any personal data required to be disclosed to a data subject according to the provisions of chapter sixty-six A, and said personal data so misused is material to the establishment of the defendant's liability to the data subject, the action may be brought at any time within three years after such misuse is discovered.

MASS. GENERAL LAWS C. 231, §118

§118. Relief from Interlocutory Orders of Superior Court, etc.; Preliminary Injunctions.

A party aggrieved by an interlocutory order of a trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department any file, within thirty days of the entry of such order, a petition in the appropriate appellate court seeking relief from such order. A single justice of the appellate court may, in his discretion, grant the same relief as an appellate court is authorized to grant pending an appeal under section one hundred and seventeen.

A party aggrieved by an

interlocutory order of the trial court justice in the superior court department, the housing court department, the land court department or the probate and family court department, granting, continuing, modifying, refusing or dissolving a preliminary injunction, or refusing to dissolve a preliminary injunction, or a party aggrieved by an interlocutory order of a single justice of the appellate court granting a petition for refile from such an order, may appeal therefrom to the appeals court or, subject to the provisions of section ten of chapter two hundred and eleven A, to the supreme judicial court, which shall affirm, modify, vacate, set aside, reverse the order or remand the cause and direct the entry of such appropriate

order as may be just under the circumstances. An appeal under this paragraph shall be taken within thirty days of the date of the entry of the interlocutory order and in accordance with the Massachusetts rules of appellate procedure. Pursuant to action taken by the appellate court the cause shall be remanded to the trial court for further proceedings.

The filing of a petition hereunder shall not suspend the execution of the order which is the subject of the petition, except as otherwise ordered by a single justice of the appellate court.

MASS. GENERAL LAWS C. 66, §10

§10. Records Open for Public Inspection.

(a) Every person having custody of

any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search. The following fees shall apply to any public record in the custody of the state police, the capitol police, the Massachusetts Bay Transportation Authority police, the metropolitan district commission policy

of any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half by eleven inch sheet of paper.

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a

public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to

insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the administrative remedies provided by the commissioner of administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

(c) In any court proceeding pursuant to paragraph (b) there shall be

a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion, obtain copies of certain public records from local officials for a fee as provided for in this chapter.

The commissioner of public safety and his agents, servants, and attorneys including the keeper of records of the firearms records bureau of said department, or any licensing authority, as defined by chapter one hundred and forty shall not disclose any records

divulging or tending to divulge the names and addresses of persons who own or possess firearms, rifles, shotguns, machine guns and ammunition therefor, as defined in said chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

MASS. GENERAL LAWS. C. 4, §7
PARAGRAPH TWENTY-SIXTH (c)

"Public Records". - Twenty-sixth, "Public records" shall mean all books, papers, maps, photographs, recorded

tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exemptions in that they are:

(C) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.

Supreme Court, U.S.
FILED
NOV 9 1988
JOSEPH F. SPANIOL
CLERK

No. 88-434

In the
Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD J. SINNOTT,
PETITIONER,

v.

CHARLES A. RADIN, STATE-BOSTON RETIREMENT BOARD, THOMAS W. GATELY, LOUISE DAY HICKS, NEWELL COOK, BRIAN LEAHY, HAROLD J. CARROLL AND KEVIN H. WHITE,
RESPONDENTS.

Respondent's Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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Questions Presented for Review

I. Whether state law provided independent and adequate grounds for the Massachusetts Supreme Judicial Court's ruling that a trial court did not abuse its discretion in denying a motion to compel a reporter to disclose his confidential news sources, thus precluding the exercise of certiorari review.

II. Whether the petitioner's claim that the trial court's order denying him discovery violated his rights under the Fourteenth Amendment was adequately presented in the state system to justify the exercise of certiorari review.

III. Whether a state court's ruling that the public interest in the free flow of information outweighs the petitioner's interest in obtaining discovery and that, therefore, a non-party newsperson need not disclose his confidential news sources conflicts with federal law in a case where the Commonwealth's highest court has found that: (1) petitioner's civil invasion of privacy claims are of "questionable viability;" (2) alternative sources of the information sought from the newsperson are available to the petitioner; and (3) petitioner has failed to demonstrate a need to know the precise identity of the sources.

IV. Whether the First Amendment bars a public official from prevailing on a claim based upon the disclosure of truthful information concerning the questionable circumstances surrounding the official's application for a public disability pension arising out of the performance of the official's public duties, thereby rendering unnecessary the disclosure of a non-party newsperson's sources.

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No. 88-434

In the

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD J. SINNOTT,
PETITIONER,

v.

CHARLES A. RADIN, STATE-BOSTON RETIREMENT BOARD, THOMAS W. GATELY, LOUISE DAY HICKS, NEWELL COOK, BRIAN LEAHY, HAROLD J. CARROLL AND KEVIN H. WHITE,
RESPONDENTS.

Respondent's Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

Respondent Charles A. Radin respectfully prays that Richard J. Sinnott's petition for a writ of certiorari to review the decision of the Massachusetts Supreme Judicial Court dated June 13, 1988 be denied.

Constitutional Provisions and Rules Involved

This case involves Article 16 of the Declaration of Rights of the Massachusetts Constitution and Massachusetts Rules of Civil Procedure 26(c) and 45:

> The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Article 16 of the Declaration of Rights of the Massachusetts Constitution.

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; . . . .

Massachusetts Rule of Civil Procedure 26(c).

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending.

Massachusetts Rule of Civil Procedure 45(f).

Statement of the Case

This petition arises out of an action for invasion of privacy brought by petitioner Richard J. Sinnott ("Sinnott"), a former

Boston public official, against the Boston Retirement Board and various Boston city officials. Respondent Charles A. Radin ("Radin") is a newspaper reporter employed by Globe Newspaper Company, publisher of *The Boston Globe*. Neither Radin nor the *Globe* are parties to the underlying case.

Sinnott claims that his privacy was invaded by the disclosure to Radin of the contents of an "accident statement" filed with a disability pension application submitted by Sinnott to the Boston Retirement Board in 1982. On April 5, 1982, the *Globe* published an article written by Radin (the "Article") which concerned the questionable circumstances surrounding Sinnott's accident statement. The Article was one of a series of over 150 stories published by the *Globe* concerning alleged abuses and inefficiencies in Massachusetts' $400 million-a-year public employee pension system.[1] The information in the Article concerning the contents of Sinnott's accident statement was obtained by Radin from confidential sources who provided

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[1] Among other cases reported in the *Globe* series were:

1. a City official named Robert Toomey who, after purchasing nine private insurance policies, retired on a lifetime disability pension as a result of an accident witnessed only by his friends and who, despite his claims to the contrary, was not wearing a cervical collar during all of his waking hours as a result of the accident;
2. a former Deputy Mayor named Clarence "Jeep" Jones who, after receiving a lifetime disability pension award, continued to work for, and be paid by, the City;
3. a City official who applied for a disability pension on the basis of nightmares he had suffered concerning City Council meetings and his fear of City Hall elevators;
4. a Boston City Hospital employee who had cashed a disability check for $6,670.48 while entitled to payment of only $670.48;
5. a Boston policeman who received a full disability as a result of an injured thumb; and
6. disability pension benefits paid to individuals who apparently were no longer alive. Supreme Judicial Court Record Appendix ("SJC R.A.") 52 at ¶5, 65-85.

the information on the express condition that Radin not reveal their identities. SJC R.A. 49-50, 65-66.

A. *Facts Surrounding Sinnott's Pension Application*

Sinnott is a long-time Boston public official and public figure. From 1960-68, he served as press secretary to Boston Mayor James F. Collins, as well as editor of the *City Record*, the City Greeter, and publicity chief for the Boston Traffic and Parking Department. SJC R.A. 91-92. In 1960, he also became the City's Licensing Chief, a position which gave him authority to censor entertainment in Boston. SJC R.A. 91-92. Sinnott also attained considerable notoriety as a columnist for several neighborhood newspapers in the Boston area and, more recently, as a $50,000 winner in the Massachusetts Lottery's "Big Money Game." SJC R.A. 11, 142043; *Boston Sunday Globe, Week in Review*, at 61 (Dec. 23, 1984).

On February 17, 1982, Sinnott was fired as the City Licensing Chief. SJC R.A. 94, 207. Within a few days after receiving notice of his termination, Sinnott telephoned Louise Day Hicks, a member of the Boston Retirement Board. SJC R.A. 125. Sinnott has described, under oath, their conversation as follows:

> I said, "Will you point me in the right direction? I want to apply for a pension." She said, "Gee, I think you have to do it within maybe 30 days, and this is a short month. You had better get this." She is not a bad person, so okay. She said, "What's been the matter with you"? I said, "I just haven't felt right. I haven't felt right for a long time." She said, "Well, why don't you apply for a disability." I said, "When"? (sic) She said, "For a disability pension.

> We took care of Bobby Toomey and Cheap (sic) Jones." [*See* n.1 *supra*] She said, "They've only been here a few years. You've been here, it seems, all of your life, and why don't you apply for a disability pension"? I said, "How the hell do I do that"? . . . she said, "Gee, if we did it for them, we certainly can do it for you."

SJC R.A. 113-14, 147-48.

Sinnott has testified that "[i]t was never [his] intention to file for a disability pension until Louise Day Hicks suggested it." SJC R.A. 111-12, 120, 146. He did not even think of retiring until after he learned he had been fired as Licensing Chief, a job to which he had hoped to "hold on." SJC R.A. 127-29, 155-A through 155-D, 159-C. Indeed, he challenged his firing, claiming that it was "illegal." SJC R.A. 94, 126, 138-40. Nevertheless, Sinnott retained an attorney recommended to him by Ms. Hicks and, on February 26, 1982, nine days after he was fired from a job he believed himself entitled to retain, applied for a disability pension which required him to be totally and permanently incapacitated. SJC R.A. 90, 115-17, 209.

The accident statement filed by Sinnott in connection with his application for a disability pension described three incidents which allegedly occurred over two years before while performing his public duties as Licensing Chief. First, Sinnott said that after attending a Rick James rock concert at the Orpheum Theatre on April 19, 1979, he "was unable to control [his] shaking and trembling" after a police confrontation with gate crashers. Sinnott stated that he suffered a further emotional setback by the unexpected death of an attorney during a "frenzied" licensing hearing on the allowance of a neighborhood arcade. SJC R.A. 50, 65-66, 209-210.

"The final incident which had a tremendously devastating effect upon me," wrote Sinnott, was the Who rock concert performed at Boston Garden on December 16, 1979.

> Many citizens as well as concert-goers besieged my office, in addition to media inquiries from throughout the country. There was intense pressure placed on me by all factions. . . . I attended the concert, and although there were 15,000 youngsters in attendance and no injuries, the concert itself was a reliving of the Rick James nightmare . . . [Crowd] noise was at a fever pitch and the explosion of cherry bombs near my location instilled a sense of terror throughout my entire body.

Sinnott's accident statement stated that following these three incidents, he "was reduced to a shell of [him]self, barely able to function." SJC R.A. 50, 65-66, 209-210.

On April 23, 1982, after the publication of the Article, Sinnott withdrew his disability application. SJC R.A. 132-33. On May 14, 1982, he commenced this action based upon the allegedly unauthorized disclosure of the contents of his accident statement. SJC R.A. 307.

In discovery taken in this case, Sinnott has admitted that his accident statement "made it appear that [he was] a faker trying to get something for nothing." SJC R.A. 172-73, 158-J through 158-K, 159, 182-83. Moreover, he has acknowledged that the accident statement which he executed contained several inaccuracies. For example, it erroneously stated that following the Who concert he received "*increased* and *constant* psychiatric care and medical attention." (Emphasis added.) In fact, he did not first see a psychiatrist until some 18 months *after* the Who concert. Sinnott also now concedes that he never has

received "constant" psychiatric care and, moreover, his entire treatment consisted of 6-8 visits with a psychiatrist. SJC R.A. 156-158-K.

Sinnott's accident statement also incorrectly stated that:

> It was during the past two years that the stress of my position took its toll. *At this time* I was under the care of . . . Doctor Daniel Weiss, a psychiatrist, for the emotional distress that accompanied my position.

(Emphasis added.) Contrary to the accident statement, Sinnott had not been under Dr. Weiss' care for two years at the time the application was filed, but rather first saw Dr. Weiss some seven months before he was fired in February of 1982. SJC R.A. 179-80.

As to his claim that he was "continuously" under doctors' care from 1964-82 for stress that accompanied his position as Licensing Chief, discovery has revealed that Sinnott's allegedly "continuous" medical care consisted principally of annual check-ups and blood pressure medication. SJC R.A. 99-104, 174-79.

On April 5, 1982, the Article was published in the *Globe*. The Article contained excerpts of Sinnott's accident statement, focusing on its references to the two rock concerts and the frenzied licensing hearing. No medical or psychological illness, diagnosis, treatment or prognosis was contained in the Article, nor were there any references to comments made by treating physicians or other medical personnel. Rather, the Article simply quoted Sinnott's description of his performance of his official duties and its alleged effect on him. SJC R.A. 65-66.

B. *Possible Alternative Sources for the Information Sought from Radin*

On March 17, 1982, after filing his accidental disability application but prior to the publication of the Article, Sinnott received a telephone call from Albert Kramer, the business manager for the Hynes Auditorium. According to Sinnott, Mr. Kramer said that Theodore Anzalone had Sinnott's pension application and that "they were going to do a job on me . . . and they were not going to let me go easy." SJC R.A. 108-109, 118, 131. Mr. Kramer has not been deposed in this case. SJC R.A. 204.

Sinnott has testified that he learned from several sources how his application was disclosed to so-called "unauthorized persons." SJC R.A. 7.

> Who disclosed my confidential disability application? All right, we will start with Mr. Brian Lahey, who is the executive officer of the Boston Retirement Board and who's charged with maintaining the records there and the confidentiality of any applications. Mr. Lahey took that application to the inside counsel. Mr. Cullen, and the outside counsel, Mr. Anzalone. Mr. Anzalone then showed it to his wife-to-be and they were so smitten by it, they made copies which they distributed around City Hall.
>
> The Anzalones then showed it to Kevin White, who summonsed Harold Carroll and George Regan, the Mayor's press secretary. . . . They showed it to an old friend of mine . . . Charles Radin.

SJC R.A. 105-106. The source of the foregoing information, Sinnott testified, was Louise Day Hicks. SJC R.A. 107.

Sinnott testified that other "[p]eople who saw copies of [his] medical application around City Hall" also provided him with information concerning how the application was made public. SJC R.A. 107. According to Sinnott, his application was shown around City Hall by his boss, Joanne Prevost. SJC R.A. 145, 181. A Mr. Kenneth Whelan told Sinnott that an employee of the licensing division named Marlene Knight showed him a xerox copy of Mr. Sinnott's application. Ms. Knight reportedly told Mr. Whelan that Joanne Prevost was "overjoyed" that she had his application. SJC R.A. 152-55. Neither Mr. Whelan nor Ms. Knight have been deposed in this action. SJC R.A. 204.

According to Sinnott, attorney Vincent Murray told him that the defendant Louise Day Hicks stated that Theodore Anzalone and Joanne Prevost obtained Sinnott's application two days before the Article was published and provided it to Mayor White and Harold Carroll. SJC R.A. 118-A through 119. Mr. Murray has not been deposed in this action. SJC R.A. 204.

Mr. Sinnott also has testified that Barbara Powderly, a Retirement Board employee told Mr. Sinnott that Mr. Gately had said that "we set him up and *The Globe* finished him off." SJC R.A. 149-51. Ms. Powderly also has not been deposed. SJC R.A. 204.

Joanne Prevost Anzalone and Theodore Anzalone, neither of whom are parties to this case, have invoked the Fifth Amendment and refused to testify concerning their knowledge, if any, of the underlying facts of plaintiff's case. SJC R.A. 219, 229-A, Supp. SJC R.A. 342-69.

C. *Public Interest in The Globe Series*

The *Globe's* series on pension abuse assisted legislative efforts to reform the Massachusetts public employee pension system. In the words of a former state legislator and Deputy

Commissioner of the Division of Public Employee Retirement Administration:

> In 1982, as a result of a series of articles published in *The Boston Globe* concerning alleged abuses and inefficiencies in the public employee pension system, considerable attention was given to the system and to its problems. . . . The public attention given to the pension system as a result of the *Globe's* articles enabled those of us in the Legislature who previously had attempted to gather support for reforming the pension system to enlist the support needed to pass significant and comprehensive legislation reforming the pension system and, consequently, save the taxpayers millions of dollars.

SJC R.A. 52-53.

D. *The Supreme Judicial Court's Opinion*

In its opinion reversing the judgment of contempt entered against Radin, the Supreme Judicial Court ("SJC") stated that "the narrow question on review" was whether the trial judge had abused the "broad measure of discretion" accorded him in denying Sinnott's motions to compel Radin to reveal the sources of the Article. Petitioner's Appendix ("App.") 13. The court observed that its prior opinions framed the "critical inquiry" as a balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information. App. 15-16. It then held that the trial court's assessment of the relative weight of those public interests could not be said, as a matter of law, to be incorrect, "especially in light of the questionable viability of Sinnott's

invasion of privacy claims and the lack of a clear demonstration of reasons for a need to know the precise identity of Radin's sources." App. 18-19. In addition, the SJC held that the trial court correctly had considered the availability of alternative sources in denying further discovery from Radin. App. 19. Finding no abuse of discretion, the judgment of contempt was reversed. App. 14.

Reasons Why a Writ of Certiorari Should Not Be Granted

I. The Supreme Judicial Court's Decision Had an Independent and Adequate Basis in State Law, Thus Precluding the Exercise of Certiorari Review

By focusing solely on the First Amendment considerations relied upon by the SJC in reversing the judgment of contempt against Radin, Sinnott totally ignores the wholly independent state law grounds which provided a separate basis for the SJC's decision. Viewed in the light of those independent state law grounds, there is no basis for concluding that "the court decided the case the way it did because it believed that federal law required it to do so." See *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983).

Radin's opposition to Sinnott's subpoena has been based, from the outset, on four independent grounds, three of which rest entirely on state law. Apart from the First Amendment, Radin has opposed forced disclosure on the basis of: (1) Article 16 of the Declaration of Rights of the Massachusetts Constitution;[2] (2) Mass. R. Civ. P. 26(c) and 45; and (3) the common

[2] The SJC has stated that "no inference should be drawn that the Declaration of Rights of the Constitution of this Commonwealth is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution." *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 343, 73 N.E.2d 241, 245 (1947).

law of Massachusetts. App. 5. In that context, the *Sinnott* court's statement of the question presented in the case quite clearly provides the requisite "plain statement," *Long*, 463 U.S. at 1041, that its decision finds independent and adequate footing on state law grounds.

> The narrow question on review in this case is whether the Superior Court judge's denials of the motions to compel and the motions to vacate those orders constituted an abuse of the "broad measure of discretion" accorded him. *Matter of Roche*, 381 Mass. 624, 638 (1980), citing *Matter of Pappas*, 358 Mass. 604, 614, n.13 (1971). . . . Unless that ruling constituted an abuse of discretion, there is no basis for the judgment of contempt. (Citation omitted). We discern no such abuse of discretion and, therefore, reverse the adjudication of civil contempt.

App. 13-14.

The *Sinnott* court stated that in properly exercising its discretion to deny Sinnott's motion to compel, the trial court had applied the principles and considerations enunciated in *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources*, 395 Mass. 164, 479 N.E.2d 154 (1985). App. 7. In that earlier decision, the SJC reiterated its previous declarations that "there is no constitutionally based reporter's privilege under the First Amendment or art. 16." *Id.* at 171, 479 N.E.2d at 158. While acknowledging that a trial court considering a motion to compel disclosure of confidential news sources should "consider the effect of compelled disclosure on values underlying the First Amendment *and* art. 16" of the Declaration of Rights of the Massachusetts Constitution, *id.* at 171, 479 N.E.2d at 158 (emphasis added), the

Petition court ruled that any protections it might in the future recognize would be based on the development of the common law of Massachusetts. *Id.* at 170-72, 479 N.E.2d at 157-59.

The *Sinnott* court also expressly relied on its previous opinion in *Matter of Roche*, 381 Mass. 624, 411 N.E.2d 466 (1980). App. 13-18. In one section of *Roche* referred to by the *Sinnott* court, the SJC cited *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), for the proposition that "the United States Supreme Court has established that the First Amendment does not 'grant newsmen a testimonial privilege that other citizens do not enjoy.'" *Roche*, 381 Mass. at 631, 411 N.E.2d at 472. "We are not free," the *Roche* court continued, "to construe the First Amendment as creating a constitutional protection broader than that established by the Supreme Court." *Id.* at n.8. Foreshadowing its decision in *Sinnott*, the *Roche* court nevertheless noted its "willingness to consider, in future cases, whether the central role a free discussion of public issues plays in a self-governing society requires, *as a matter of Massachusetts practice*, that persons addressing such issues be afforded more clearly defined protection against intrusive discovery . . . ." *Id.* at 638-39, 411 N.E.2d at 476 (emphasis added).

Consistent with its prior rulings (on which it expressly relied) that it might in the future recognize protections for a newsperson's sources as a matter of Massachusetts law, the *Sinnott* court described the balancing process which was engaged in by the *Sinnott* trial court as "a necessary component of the analysis *required by Mass. R. Civ. P. 26(c)* to 'assess the competing interests of preventing annoyance, embarrassment, oppression, or undue burden or expense,' . . . and considerations of an efficient and just resolution of the action." App. 7-8 (emphasis added).

In sum, the *Sinnott* opinion makes clear that state law provided a wholly independent and adequate basis for the finding that the trial court had not abused its discretion in denying

discovery of Radin's sources. The exercise of certiorari review, therefore, cannot be justified.

II. Sinnott's Claim That the Supreme Judicial Court's Decision Abridged His Rights Under the Fourteenth Amendment Was Not Adequately Presented in the State System to Justify the Exercise of Certiorari Review

Sinnott's petition describes the third question presented for review as "whether refusing to compel a non-party reporter to answer questions relating to persons previously deposed which may impeach or contradict the testimony of such persons abridges a litigant's interest in obtaining evidence necessary to prove his claim and the public interest in the fair administration of justice guaranteed under the Fourteenth Amendment."

No Massachusetts court has yet had the opportunity to resolve that issue. Neither Radin's statement of the issues in the appeal of the judgment of contempt entered against him, nor Sinnott's statement of the issues in his brief on appeal, addressed the question of whether Sinnott has a right under the Fourteenth Amendment to pursue his civil privacy claims, or whether a trial court's order limiting permissible discovery concerning those claims violates the Fourteenth Amendment. (See Respondent's Appendix at 1a-3a, attached hereto.) Under these circumstances, "absent the adversarial dispute necessary to apprise the state court of the argument" now being raised, this Court should decline certiorari review. *Illinois* v. *Gates*, 462 U.S. 213, 220-23 (1983); *Bankers Life and Casualty Co.* v. *Crenshaw*, U.S. , 108 S. Ct. 1645, 1650 (1988).[1]

[1] In any event, Sinnott's claim that he was denied discovery rights guaranteed by the Fourteenth Amendment to the Constitution is an insubstantial claim. The right to pretrial discovery is not guaranteed by the Fourteenth Amendment.

III. The Balancing Process Engaged in by the Trial Court, and Affirmed by the SJC, Does Not Conflict With Applicable Decisions of This Court

The Supreme Judicial Court's decision that the trial court did not abuse its discretion in denying Sinnott's discovery request is consistent with, and indeed compelled by, this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

Branzburg held that newspaper reporters subpoenaed to appear before grand juries to testify concerning arguably criminal activities to which they had been eye-witnesses were required to appear and answer relevant questions put to them by the grand jury. In so doing, however, the Court was careful to take account of the First Amendment interests the reporters asserted. Writing for the majority, Mr. Justice White observed that the Court did not "question the significance of free speech,

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The kind of discretion accorded to a court to regulate discovery under Mass. R. Civ. P. 26(c) and 45 exists, in one form or another, in virtually all of the courts in this nation. See generally Fed. R. Civ. P. 26(c). If, as this Court has held, the right to a jury trial guaranteed by the Seventh Amendment to the Constitution does not apply to trials in state courts, *Alexander* v. *Virginia*, 413 U.S. 836 (1973), surely the Fourteenth Amendment does not guarantee pretrial discovery in a civil action. See *Coughlin* v. *Westinghouse Broadcasting and Cable*, 603 F. Supp. 377, 382-383 (E.D. Pa.), *aff'd*, 780 F.2d 340 (3d Cir. 1985), *cert. denied*, 476 U.S. 1187, 106 S. Ct. 2927 (1986) (application of Pennsylvania shield law does not deprive plaintiff of due process rights guaranteed by Fourteenth Amendment); *Maressa* v. *New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, 385, *cert. denied*, 459 U.S. 907 (1982) (because plaintiff's interest in compelling discovery is not of constitutional dimension, New Jersey shield law did not violate any due process rights of libel plaintiff). Cf. *Samuelson* v. *Susen*, 576 F.2d 546, 552 (3d Cir. 1978) (medical review committee privilege did not violate libel plaintiff's due process rights); *Graham* v. *Teledyne-Continental Motors*, 805 F.2d 1386, 1390 (9th Cir. 1986), *cert. denied*, U.S. , 108 S. Ct. 67 (1987) ("Courts have consistently rejected arguments that deprivation of evidence constitutes a denial of due process.").

press, or assembly to the country's welfare." *Id.* at 681. "Nor," he continued,

> is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

Id. Along the same lines, Mr. Justice White noted that the cases then before the Court involved no attempt "to require the press to publish its sources of information or indiscriminately to disclose them on request." *Id.* at 682.

On balance, however, the Court concluded that the interest of the State in prosecuting violations of its criminal laws satisfied the First Amendment requirement that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights." *Id.* at 700.

Mr. Justice Powell, who concurred specially in *Branzburg* and whose concurrence was necessary to create the majority of five which decided the case, was even more emphatic in his articulation of the view that a reporter's relationship with sources was entitled to the protections of the First Amendment. In Justice Powell's opinion, the protections of the First Amendment require that in each case the legitimate needs of law enforcement should be balanced against the First Amendment claims asserted by the reporter. His opinion was expressly written, in his own words, "to emphasize what [seemed to him] to be the limited nature of the Court's holding." *Id.* at 709. Continuing, he stated that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.*

> Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

Id. at 710.

From *Branzburg* has come the widespread recognition that the First Amendment forbids the unnecessary forced disclosure of confidential news sources. Post-*Branzburg* decisions have held that a party seeking disclosure must, in essence, make three conceptually related showings: (1) that the information sought is available from no alternative source; (2) that the interest in disclosure is strong and compelling enough to override the undoubted disruption in the free flow of information which such disclosure necessarily would entail; and (3) that the information sought goes to the heart of the claim or defense of the party seeking disclosure.[4]

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[4] See generally 28 C.F.R. § 50.10 (Dept. of Justice Policy with Regard to the Issuance of Subpoenas to Members of the News Media). See also *Bruno & Stillman Co.* v. *Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Von Bulow* v. *Von Bulow*, 811 F.2d 136 (2d Cir.), *cert. denied sub nom.*, *Reynolds* v. *Von Bulow*, U.S. , 107 S. Ct. 1891 (1987); *Miller* v. *Transamerica Press, Inc.*, 621 F.2d 721 (5th Cir.), *supp. op., reh., den.*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Cerrito*

The *Sinnott* court did no more than apply the principles established in *Branzburg* to the particular facts of this tenuous (at best) civil invasion of privacy action. By "balancing between the public interest in every person's evidence and the public interest in the free flow of information," the *Sinnott* court simply adhered to Justice Powell's admonition in *Branzburg* that the "asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." 408 U.S. at 710. Such a balancing process obviously required the court to

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v. *Time, Inc.*, 302 F. Supp. 1071 (N.D. Calif. 1969), *aff'd in part, rev'd in part*, 449 F.2d 306 (9th Cir. 1971); *Garland* v. *Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *KSDO* v. *Riverside Superior Court*, 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (Cal. Ct. App. 1982); *Gagnon* v. *Fremont District Court*, 632 P.2d 567 (Colo. 1981); *Sierra Life Ins. Co.* v. *Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103 (1980); *Downing* v. *Monitor Publishing Co.*, 120 N.H. 383, 415 A.2d 683 (1980); *Taylor* v. *Miskovsky*, 640 P.2d 959 (Okla. 1981); *United States* v. *Steelhammer*, 561 F.2d 539 (1977); *Gulliver's Periodicals* v. *Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978).

The test has also been applied in civil cases to which reporters were not parties: E.g., *McGraw-Hill, Inc.* v. *Arizona*, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982); *Zerilli* v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Riley* v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Matheson* v. *Bangor Publishing Co.*, 414 A.2d 1203 (Me. 1980).

It also has been applied in criminal cases, both at the state and federal level. *United States* v. *Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *United States* v. *Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd sum.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972); *Tribune Co.* v. *Huffstetler*, 489 So.2d 772 (1986); *Laughlin* v. *Florida*, 323 So.2d 691 (Fla. App. 1975), *cert. denied*, 339 So.2d 1170 (Fla. 1976); *Kansas* v. *Sandstrom*, 581 P.2d 812 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); *Brown* v. *Commonwealth*, 204 S.E.2d 429 (Va.), *cert. denied*, 417 U.S. 966 (1974); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974); *Zelenka* v. *State*, 266 N.W.2d 279 (Wis. 1978).

consider the "investigative purpose" of and the "public interest" in Radin's use of confidential sources, "especially in light of the questionable viability of Sinnott's invasion of privacy claims and the lack of a clear demonstration of reasons for a need to know the precise identity of Radin's sources." App. 17-18. Similarly, as the SJC found, the availability of alternative sources also was properly considered by the trial court in avoiding the needless disclosure of confidential relationships. App. 19. Given *Branzburg's* requirement that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights," 408 U.S. at 700, the SJC could only conclude that Sinnott's questionable (at best) need for forced disclosure did not justify the infringement of First Amendment rights that an order compelling disclosure would entail.

Sinnott argues that certiorari nevertheless should be granted because his accident statement was not available to the general public under Massachusetts law. "[I]t is an error of law," he argues, "to consider the impact of compelled disclosure on the free flow of information to which the press has no right of access." Petition at 33.

A threshold, and fundamental, flaw with Sinnott's argument is that there simply is no law which restricts public access to Sinnott's accident statement, even if one assumes that the information could not have been obtained under the Massachusetts Freedom of Information Act ("FOIA") (a proposition which Radin disputes). Like its federal counterpart, the Massachusetts FOIA does not prohibit a custodian from releasing exempt information. Rather, it merely provides that a custodian is not compelled to disclose exempt information, as he must do with non-exempt materials. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 294 (1979); *Westinghouse Broadcasting Co.* v. *Sergeant-At-Arms of the General Court*, 375 Mass. 179, 185 n.9, 375 N.E.2d 1205, 1209 n.9 (1978). Similarly, because

M.G.L. c. 66A does not apply to local units of government like the Boston Retirement Board, that statute also does not prohibit the release of Sinnott's accident statement. See *Spring* v. *Geriatric Authority of Holyoke*, 394 Mass. 274, 475 N.E.2d 727 (1984). It is no wonder, then, that the SJC spoke of the "questionable viability" of Sinnott's claims.

The very linchpin of Sinnott's certiorari argument, therefore, is his mistaken belief that Massachusetts law forbids public access to his accident statement. Both the *Sinnott* opinion and prior Massachusetts precedent indicate to the contrary. At a minimum, a definitive ruling on that issue of pure state law would have to be obtained before this Court could consider Sinnott's certiorari argument.

Even assuming that the SJC might one day hold that Massachusetts law does forbid public access to public officials' accident statements, Sinnott's argument that the First Amendment automatically becomes irrelevant misunderstands the difference between a constitutional right of access and a constitutional right to disseminate information. Reduced to its essentials, Sinnott's argument limits First Amendment protections for public debate to those topics which the government has deigned the public worthy or capable to discuss. This Court has long made clear, however, that the issue of whether the public and the press have a right of access to governmental information is wholly distinct from the issue of whether the dissemination of restricted information, once obtained by the press, is entitled to First Amendment protection. Indeed, it is the protections afforded in the latter circumstances that have been recognized as laying at the heart of the First Amendment. See *New York Times* v. *United States*, 403 U.S. 713 (1971); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979) ("A free press cannot be made to rely solely upon the suffrance of government to supply it with information.").

Nor, as Sinnott seems to imply, does the fact that the source must remain anonymous diminish the First Amendment interests at stake. As this Court has acknowledged, communications from confidential sources have played a critical role in this country's tradition of free spirited public debate.

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption

> of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley v. *California*, 362 U.S. 60, 64-65 (1960). See also *NAACP* v. *Alabama*, 357 U.S. 449, 462-63 (1958); *McCray* v. *Illinois*, 386 U.S. 300, 312 (1967); 8 Wigmore On Evidence, § 2374 (Rev. ed. 1961).

In sum, Sinnott's petition for certiorari is based on the misconception that if state law prohibits access to his accident statement (a pure issue of state law on which Sinnott and the SJC apparently disagree), the First Amendment would offer no protection for the dissemination of such information, regardless of its relevance to the public's examination of the performance of his public duties and to its evaluation of the public pension system. Such a claim does not merit certiorari review.

IV. Because the First Amendment Bars Sinnott's Privacy Claims, the Certiorari Petition Presents No Important Unsettled Question of Federal Law

Recent historical events such as the Viet Nam War, Watergate, and the Iran-Contra Affair each have demonstrated the need for First Amendment protections for the dissemination of information which the government has designated as confidential but which nevertheless is of intense, legitimate public interest. Despite those lessons, Sinnott's entire action is based on the flawed notion that, assuming Massachusetts law restricts access to certain information, the truthful disclosure of that information, regardless of its underlying nature, constitutes an unlawful invasion of privacy. Because the First Amendment prohibits sanctions from being placed on the dissemination of truthful information relevant to the conduct of a public official,

even assuming that Massachusetts law prohibited access to Sinnott's accident statement, his privacy claims nevertheless would be constitutionally barred.

The public's legitimate interest in the undisputably truthful account of Sinnott's accident statement is particularly intense given: (1) the context in which the application arose (i.e., in the midst of an examination of alleged abuses and inefficiencies of the pension system); (2) the fact that it was filed only: (a) after Sinnott had been fired, (b) because he had been fired, and (c) at the suggestion of Louise Day Hicks who had told him that "we did it for Bobby Toomey, we can do it for you", SJC R.A. 146; (3) the fact that the statement contained facts which are not true and which, as Sinnott conceded, make him look like a "faker"; (4) the fact that the alleged injury occurred over two years before the application was filed, and (5) the novel nature of the asserted grounds for Sinnott's application (attendance at two rock concerts and a licensing hearing) — an application which, if granted, might have cost the taxpayers thousands of dollars, and which application, after public disclosure, was in fact withdrawn. Finally, the far-reaching reforms of the pension system which came about in part as a result of the attention given to the system by the *Globe* series and by others stand as a further testament to the public nature of the facts which form the basis for Sinnott's invasion of privacy claim.

The constitutional flaws in Sinnott's case were highlighted in this Court's recent decision in *Hustler* v. *Falwell*, U.S. , 108 S. Ct. 876 (1988). Rejecting a public figure's claim for emotional distress, the Court stated:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . 'The fact that society may find speech

> offensive is not a sufficient reason for suppressing it.' [Citation omitted]. . . . [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 879-82.

Just as public officials may not recover for the tort of emotional distress without showing a false statement of fact, so too the logic and language of *Falwell* compels the conclusion that a public official may not recover for invasion of privacy (which is, after all, a claim seeking damages for emotional distress) if no false information was disseminated, at least where the published information concerns the official's conduct in office. As was recognized long ago, "[a] popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy or perhaps both." 9 Writings of James Madison 103 (6. Hunt. 2d. 1910). Truthful dissemination of matters of public interest concerning performance in office by a public official thus cannot form the basis for an invasion of privacy claim under the First Amendment, regardless of state statutory law to the contrary. See, e.g., *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978); *Smith* v. *Daily Mail Publishing*, 443 U.S. 97 (1979); *Cox Broadcasting* v. *Cohn*, 420 U.S. 469 (1975); Restatement (Second) of Torts, § 652D (1978). Because Sinnott cannot prevail on his claims, forced disclosure of Radin's sources should not be allowed.

In addition, any construction of M.G.L. c. 214, § 1B and § 3B which permitted the imposition of sanctions for the disclosure of information simply because the material was not

publicly accessible without regard to whether the underlying information constitutes a matter of legitimate public concern would render the statutes unconstitutionally overbroad. Such a construction would lead to absurd results, as, for example, by imposing sanctions for the dissemination of information as innocuous as the contents of a typical library card or a gun permit, which, under M.G.L. c. 4, § 7, twenty-sixth (j) and (k) are exempt from disclosure under the Massachusetts FOIA. The substantial overbreadth of such a construction require the dismissal of Sinnott's claims. See generally *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836, *cert. granted,* U.S. , 108 S. Ct. 1994 (1988); L. Tribe, Constitutional Law, §§ 12-24 through 12-30 (1978).

Similarly, if M.G.L. c. 214, § 1B and § 3B were construed to permit the sanctioning of truthful speech concerning the conduct of public officials, the statutes would be unconstitutionally vague, also requiring the dismissal of Sinnott's claims and obviating the need for forced disclosure of Radin's sources. See generally *Coates* v. *City of Cincinatti*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "annoying" public conduct held unconstitutionally vague); *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974) (statutory prohibition on contemptuous treatment of the flag held unconstitutionally vague). Cf. *Falwell*, 108 S. Ct. at 877 (rejecting "outrageousness" standard of liability as overly subjective).

Conclusion

For each of the foregoing independent reasons, respondent Charles A. Radin respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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November 9, 1988

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Appendix

STATEMENT OF THE ISSUES IN BRIEF OF APPELLANT CHARLES A. RADIN, IN SINNOTT v. BOSTON RETIREMENT BOARD, ET AL., MASSACHUSETTS SUPREME JUDICIAL COURT NO. S-4754

1. Whether the First Amendment to the United States Constitution, Article 16 of the Declaration of Rights of the Massachusetts Constitution, or the common law afford a privilege against the disclosure of confidential news sources in civil actions for invasion of privacy brought by public officials in cases where the newsperson is not a party to the underlying proceedings.

2. Whether a judgment of civil contempt against a non-party newspaper reporter for refusing to reveal confidential sources used in the preparation of a truthful newspaper article concerning possible abuses of the Commonwealth's public pension system should be reversed because the plaintiff cannot recover in his underlying action under: (a) Massachusetts law; (b) the First Amendment to the United States Constitution; and (c) Article 16 of the Declaration of Rights of the Massachusetts Constitution.

3. Whether a judgment of civil contempt against a non-party newspaper reporter for refusing to reveal confidential sources used in the preparation of a truthful newspaper article concerning possible abuses of the Commonwealth's public pension system should be reversed because the public interest in protecting the free flow of information outweighs the plaintiff's interest in obtaining the reporter's testimony in the unique circumstances of this case.

4. Whether a judgment of civil contempt against a non-party newspaper reporter for refusing to reveal confidential sources

used in the preparation of an article concerning possible abuses of the Commonwealth's public pension system should be reversed because the plaintiff has failed to exhaust several alternative sources of the information sought from the reporter.

STATEMENT OF THE ISSUES IN BRIEF OF APPELLEE RICHARD J. SINNOTT, IN SINNOTT v. BOSTON RETIREMENT BOARD, ET AL., MASSACHUSETTS SUPREME JUDICIAL COURT NO. S-4754

A. Whether Radin's refusal to answer the twenty-eight questions set forth in Exhibit 1 annexed to the Superior Court order dated February 10, 1988 was clear and undoubted disobedience of a clear and unequivocal command of the court.

B. Whether the order of the Single Justice dated January 27, 1988 which directed entry of the order dated February 10, 1988 was valid.